Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

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July 14, 2004

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SBC Communications Inc. and its affiliated companies (collectively, "SBC") respectfully submit these reply comments on the Commission's Notice of Proposed Rulemaking regarding IP-enabled services ("*IP-Enabled Services NPRM*").

INTRODUCTION AND SUMMARY

A strong and common theme runs through the overwhelming majority of comments submitted in this proceeding: to date, IP-enabled services have flourished — to the great benefit of consumers — under the Commission's unregulatory approach. Indeed, today's dynamic IP-enabled services market is characterized by high levels of competition and low barriers to entry, enabling consumers to choose from a wealth of IP-enabled services and service providers, unprecedented mobility and access to their services, and greater functionality and lower costs than traditional circuit-switched services.[1/] But at the same time, the record in this proceeding shows that the unregulated state of this market, with all of its attendant consumer benefits, is under siege from a host of state commissions that, if given the chance, would reflexively subject IP-enabled services to decades-old public utility regulation designed for the circuit-switched

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[1/] *See* Competition in the Provision of Voice Over IP and Other IP-Enabled Services, *IP-Enabled Services*, WC Docket No. 04-36, at 14 (filed May 28, 2004) ("VoIP Fact Report") (noting that "VoIP providers are now offering service at considerable discounts from circuit-switched service"); *see generally id.* at 11-20 (detailing the prices and service options available over various VoIP offerings as compared to those available over the PSTN).

world of the past. A small but vocal minority of service providers have similarly proposed foisting those same legacy regulations on incumbent local telephone companies trying to compete in the IP-enabled services market, and have promoted selective deregulation that not surprisingly would provide these providers with a competitive advantage. Finally, the Commission's own siloed regulatory regime — which, more than eight years after passage of the 1996 Act, still imposes disparate and burdensome obligations on providers of IP-enabled services based on their historic regulatory classification as incumbent local telephone companies — is unnecessarily inhibiting full and fair competition in the IP-enabled services marketplace.

If the Commission is to fulfill Congress's directive that this marketplace exist "unfettered by Federal or State regulation,"[2/] the Commission cannot afford — indeed, this Nation cannot afford — to let the critical questions of the *IP-Enabled Services NPRM* linger unanswered for many months or years into the future. Instead, the Commission must expeditiously establish a competitively neutral, unregulatory framework for IP-enabled services by addressing the following critically time-sensitive issues in an order released by the end of this year, if not sooner:

- *Interstate Jurisdiction.* As virtually all commenters agree, the Commission has the authority to maintain a climate of unregulation through its clear and exclusive jurisdiction over interstate communications, which manifestly include IP-enabled services. This is so, as most commenters recognize, because IP-enabled services almost always provide users with the capability to interact with multiple information sources across the globally dispersed networks and facilities that compose the Internet. They are

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[2/] 47 U.S.C. § 230(b)(2).

therefore categorically interstate communications and fall squarely within the Commission's express Title I jurisdiction over such communications.

- *Information Service Classification.* To preserve the current favorable market conditions for IP-enabled services, the Commission should classify these services as information services. Numerous commenters agree that IP-enabled services should be classified as such and allowed to develop in a largely unregulated environment, outside the scope of Title II common carrier regulations and the other substantive titles of the Act. As SBC has previously explained, IP-enabled services intrinsically offer subscribers enhanced functionality, including the capability for manipulating and storing information, and are correctly viewed as "information services" under the Act. To the extent some small minority of IP-enabled services appear to bear characteristics of telecommunications services, the Commission should forbear from the application of any Title II common carrier regulation to those services.

- *State Preemption*. To ensure that the states do not undermine the Commission's unregulatory approach, the Commission should broadly declare that any state regulation of IP-enabled services that conflicts with federal policy or undermines the congressionally mandated policy of unregulation is preempted. Preemption is proper because there is no practicable way to isolate any intrastate service that the states could regulate, and because state-level common carrier regulation of any component of IP-enabled services would impose undue costs on providers of IP-enabled services and would thus thwart Congress's free-market vision. Most commenters — *including several state regulators* — generally agree that preemption of such regulation is necessary to

ensure that a patchwork of state-level regulation does not distort or chill innovation and competition for IP-enabled services.

- *No Concentration of Market Power.* Some commenters, such as MCI and Z-Tel, perpetuate the unfounded argument that ILECs exercise "market power" at the facilities level of IP-enabled services and therefore the Commission should adopt a layered model of regulation to constrain this putative market power. As an initial matter, it is far from certain that a layered model, which is a network *engineering* abstraction, is an appropriate model for a *regulatory* regime. In any event, even if a layered approach were appropriate, ILECs are not remotely dominant with respect to broadband transmission networks, but instead face robust competition from cable modem providers and the major interexchange carriers. Contrary to the claims of some commenters, SBC has not suggested that this proceeding should affect the Commission's existing rules about the availability of UNEs to telecommunications carriers, nor would deregulation of all IP-enabled services have any effect on the Commission's continued regulation of legacy telecommunications services.

- *Commission Authority to Address Public Policy Concerns.* As SBC and many other commenters recognize, classifying IP-enabled services as information services also would not inhibit the Commission from addressing important policy objectives, such as numbering, intercarrier compensation, and public policies such as 911, disability access, and universal service. The Commission has broad authority under Title II over *non-carrier-specific* issues, such as numbering and universal service, for example. And as most commenters also recognize, the Commission has broad Title I ancillary jurisdiction to pursue the general goals of the Communications Act, even as technology changes and

traffic moves from the PSTN to new, IP-enabled services. Few commenters mount any serious opposition to this point; those that attempt to do so advocate a narrow reading of the Commission's authority that is out of step with established Supreme Court and D.C. Circuit precedent.

- *Intercarrier Compensation.* The market for IP-enabled services cannot function efficiently unless the Commission resolves the confusion over the proper application of existing intercarrier compensation rules to those services. Several commenters agree that the industry urgently needs resolution of this issue to restore certainty and stability pending the adoption of a comprehensive, unified intercarrier compensation regime. To that end, the Commission should confirm that its existing rules require the payment of terminating access charges for IP-PSTN traffic and originating access charges for PSTN-IP traffic, and it should further rule that interstate access charges should apply exclusively to all such traffic.

- *Access to Numbering Resources.* The Commission should also immediately correct the distortion in its existing numbering rules by affirmatively establishing VoIP providers' rights to obtain numbers directly from the North American Numbering Plan Administrator ("NANPA") or the Pooling Administrator ("PA"). Granting VoIP providers the same right to acquire numbers as ordinary telecommunications service providers have is consistent with the procompetitive, nondiscriminatory intent of the Commission's numbering rules. As the commenters that address this issue generally agree, this will promote the efficient development of VoIP service offerings. It should also enable the Commission to directly monitor VoIP numbering usage, thereby decreasing the likelihood of number wastage or exhaust.

Other Important Public Policy Issues: 911, Disability Access, Universal Service. Of course, the paramount importance of the preceding issues in no way diminishes the need for the Commission to address other public policy issues, such as emergency calling (911), disability access, and universal service. The Commission should use its authority to design narrowly tailored rules addressing such public policy concerns. For instance, nearly all commenters agree that 911 service should be offered with IP-enabled voice services that interconnect with the PSTN, though commenters also generally urge the Commission to allow the industry to develop voluntary solutions and standards before imposing any regulations or compliance timeframes. Most commenters also agree that Commission regulation is necessary to ensure disability access to IP-enabled services. The Commission should reaffirm its commitment to the needs of people with disabilities by asserting its ancillary authority to ensure that IP-enabled services that interconnect with the PSTN provide the type of access to communications that Congress and the Commission have recognized as being critically important to ensure that individuals with disabilities have equal opportunities at work and in their communities.

With regard to universal service, the majority of commenters agree with SBC's opening comments that the Commission can and should collect universal service fund contributions from VoIP providers that offer service interconnected with the PSTN. The Commission has recognized that those who use and benefit from the PSTN, like IP-enabled services providers who interconnect with that network, should contribute to its support. As traffic migrates to IP-enabled services, collecting universal service contributions from VoIP providers will be essential to preserving the universal service fund base.

Consumer Protection. Finally, although the Commission may have *authority* to employ its Title I ancillary jurisdiction to adopt consumer protection rules for interstate communications

services,[3/] many commenters concur that specific federal consumer protection regulation of VoIP is premature and unnecessary. The market for IP-enabled services is robustly competitive and, as a result, no provider exercises market power that allows it to impose unfair conditions on consumers. Moreover, generally applicable consumer protection laws would provide ample protection and recourse for consumers. While some commenters advocate imposing many different legacy regulations, none even try to show that there is a pressing (or any) need to do so.

DISCUSSION

In Section I below, SBC addresses arguments concerning the jurisdictional nature of IP-enabled services, as well as the extent of the Commission's authority to preempt state regulation of such services. In Section II, SBC describes the proper regulatory classification for IP-enabled services. In Section III, SBC discusses the sources of the Commission's authority to address specific regulatory concerns that may arise with respect to IP-enabled services, regardless of their classification, and identifies the framework that should guide the Commission's consideration of when such regulation may be appropriate. In Sections IV through IX, SBC discusses the six substantive areas that the Commission and commenters have identified as requiring specific attention: intercarrier compensation, numbering resources, 911, disability access, universal service, and consumer protection.

I. IP-ENABLED SERVICES ARE INDIVISIBLY INTERSTATE SERVICES SUBJECT TO THE COMMISSION'S PREEMPTIVE JURISDICTION.

As SBC explained in its opening comments, the Commission has jurisdiction over all "interstate communications." That category undoubtedly includes IP-enabled services, which

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[3/] *See, e.g.*, Order on Reconsideration, *Promotion of Competitive Networks in Local Telecommunications Markets*, 32 Communications Reg. (P&F) 118 ¶¶ 7-8 (2004); Order, *2000 Biennial Review — Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 00-257 ¶ 9 (rel. May 4, 2004).

enable a user to communicate with other users and information sources across the street, across the country, and across the world. These services are also *indivisibly* interstate because their inherent geographic indeterminacy and portable nature, combined with their capacity to facilitate multiple simultaneous communications with a variety of information sources, make it infeasible to segregate any intrastate component for regulatory purposes. As such, IP-enabled services fall categorically within the Commission's exclusive jurisdiction, and the Commission should resolve any uncertainty on this point by explicitly preempting any state-level common carrier regulation of information services.[4/]

A. IP-Enabled Services Are Indivisibly Interstate in Nature.

As an initial matter, no commenter seriously contends that the Commission lacks jurisdiction over IP-enabled services. Rather, the dispute centers on whether state public utility commissions have any basis for asserting jurisdiction over these services. Indeed, the Communications Act gives the Commission broad jurisdiction over "all interstate and foreign communication by wire or radio."[5/] IP-enabled services necessarily involve interstate communications because they offer users the ability to communicate with other users and information services dispersed across the Internet.[6/] As the Commission has explained, Internet

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[4/] SBC Comments at 25-33, 43-47.

[5/] 47 U.S.C. § 152(a).

[6/] *See, e.g.*, Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9176 ¶ 54 (2001) ("*ISP Remand Order*") (noting that the Commission "ha[s] always held [ISP-bound traffic] to be predominantly interstate for jurisdictional purposes), *cert. denied sub nom. Core Communications, Inc. v. FCC*, 123 S. Ct. 1927 (2003); *id.* at 9177-78 ¶ 55 ("[T]he Commission has been consistent in its jurisdictional treatment of ISP-bound traffic."); Memorandum Opinion and Order, *GTE Telephone Operating Cos.*, 13 FCC Rcd 22466, 22468 ¶ 5 (1998) ("*GTE Order*") (describing the Internet as "an international network of interconnected computers enabling millions of people to communicate with one another and to access vast amounts of information from around the world");

communications "interact[] with a global network of connected computers,"[7/] and thus "involve computers in multiple locations, often across state and national boundaries."[8/] The Commission relied on precisely these aspects of Internet-based services when it asserted jurisdiction in 1998 over DSL services,[9/] and in 1999 and 2001 over dial-up services offered by Internet service providers,[10/] both of which necessarily involve a fundamental interstate component.[11/]

There is also broad agreement across the communications industry that IP-enabled services are *indivisibly* interstate and cannot be separated into distinct interstate and intrastate spheres of regulation. Level 3 observes that, "[i]n a rare showing of agreement across the communication industry, a wide array of entities concurs that IP-enabled services are interstate and subject to exclusively federal jurisdiction."[12/] This conclusion is shared by Internet backbone providers,[13/] CLECs,[14/] ILECs,[15/] software providers,[16/] VoIP providers,[17/] cable providers,[18/] and wireless providers.[19/]

Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4799 ¶ 1 n.1 (2002) ("*Cable Modem Declaratory Ruling*") (defining "the Internet" as a "global information system"), *rev'd on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003) ("*Brand X*").

7/ *ISP Remand Order* at 9178 ¶ 58.

8/ *Id.* at 9178 ¶ 58 n.115.

9/ *GTE Order* at 22483 ¶ 33.

10/ *See, e.g.*, *ISP Remand Order* at 9176 ¶ 54.

11/ *See* Verizon Comments at 38; Level 3 Comments at 17; Federation for Economically Rational Utility Policy ("FERUP") Comments at 7-8.

12/ Level 3 Comments at 19-20 (collecting comments).

13/ *See, e.g.*, Level 3 Comments at 13.

14/ *See, e.g.*, AT&T Comments at 45; MCI Comments at 23.

15/ *See, e.g.*, BellSouth Comments at 36; Verizon Comments at 37.

16/ *See, e.g.*, Microsoft Comments at 14.

This near-unanimity among industry participants is unsurprising. As many commenters point out, the packets carrying the contents of IP-enabled communications cannot feasibly be tracked to determine the transmission's jurisdictional end points;[20] the inherent portability of IP-enabled services enables the IP end of a VoIP call to be "anywhere in the world;"[21] and IP-enabled services have and will increasingly have the capability to facilitate multiple simultaneous communications with disparate information sources during the course of a single session.[22] For the same basic reason that it would be infeasible to carve out an "intrastate" component of IP-enabled services that (like Pulver's VoIP offering) always have *both* ends in an IP network,[23] it would also be impracticable to carve out an "intrastate" component of IP-enabled services that, like SBC's HIPCS product or Vonage's VoIP service, can interconnect with the PSTN and thus permit communications with *one* end in an IP network. And, under the "mixed use" and "inseverability" doctrines, it is settled law that the Commission has exclusive

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17/ *See, e.g.*, Nuvio Comments at 7; PointOne Comments at 8; Net2Phone Comments at 15.

18/ *See, e.g.*, National Cable & Telecommunications Association ("NCTA") Comments at 35.

19/ *See, e.g.*, Cellular Telecommunications Industry Association ("CTIA") Comments at 2.

20/ *See, e.g.*, BellSouth Comments at 33; Verizon Comments at 31; CTIA Comments at 2-3. Indeed, as CTIA explains, IP-enabled services resemble commercial mobile wireless services, which are regulated at the federal level, in their independence of geography. CTIA Comments at 3-4 (citing 47 U.S.C. § 332(c); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411 (1994) (*"CMRS Second Report and Order"*)).

21/ Verizon Comments at 34; *see also, e.g.*, CTIA Comments at 2-3; Net2Phone Comments at 15.

22/ *See GTE Order* at 22478-79 ¶ 22 (1998) (footnote omitted); *ISP Remand Order* at 9178 ¶ 58.

23/ Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3320-21 ¶ 20 (2004) (*"Pulver Declaratory Ruling"*); *see also id.* at 3322 ¶ 22.

jurisdiction over services that have a significant interstate component from which any intrastate elements cannot be practicably separated.[24/]

Finally, as BellSouth observes, subjecting IP-enabled services to a scheme of dual federal-state jurisdiction would produce absurd anomalies within the Commission's existing regulatory scheme. IP-enabled services are generally offered over broadband transmission facilities, such as cable modem service or DSL, that are regulated entirely at the federal level.[25/] As BellSouth notes, "[I]t would be odd indeed to conclude that broadband transmission provided by itself is subject to the Commission's exclusive authority, but that information services provided together with that transmission are not."[26/] In addition, regulation of IP-enabled services would perversely threaten the broadband infrastructure rollout itself, for it would depress incentives to innovate in VoIP and other IP-enabled "killer applications" that make broadband connection attractive to consumers.

The California commission is simply wrong in claiming that it would be feasible, using current technology, to segregate the "interstate" and "intrastate" components of IP-enabled services.[27/] As attested to by the equipment and software manufacturers on the cutting edge of

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[24/] *See, e.g., Louisiana Pub. Serv. Comm'n*, 476 U.S. 355, 375 n.4 (1986) (addressing the Commission's jurisdiction "where it was *not* possible to separate the interstate and intrastate components of the asserted FCC regulation"); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (observing that "the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements"); *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *Public Util. Comm'n of Tex. v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977); *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976); *see also Pulver Declaratory Ruling* at 3322 ¶ 22.

[25/] BellSouth Comments at 35.

[26/] *Id.* at 36.

[27/] California PUC Comments at 35-36 (arguing that "source IP" information is correlated with the location where an IP call begins and that various services may tie this information to

this field, there is today no practicable means for identifying geographic locations on the Internet that would enable "intrastate" traffic to be carved out for separate regulation by state commissions.[28/] In particular, there are a variety of reasons why a packet's source IP information or IP address cannot currently be used to determine a physical location. First, many providers use dynamic addressing, whereby a different IP address is arbitrarily assigned to each user for each login, making a tracking mechanism virtually impossible. In addition, as the Commission itself noted in the *Pulver Declaratory Ruling*, IP addresses are portable in the sense that a customer can maintain the same address at different locations.[29/] Thus, even Time Warner Telecom, which claims that location-identifying features may be developed, acknowledges on

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geographic locations); *see also* Time Warner Telecom Comments at 41 (arguing that location-identifying features (*e.g.*, for E-911) may enable service providers to differentiate interstate from intrastate traffic); Ohio PUC Comments at 25-26 (suggesting that VoIP "calls placed using NANP numbers over the PSTN can be easily separated into intrastate and interstate"). The California PUC references two companies that purport to "trace" the geographic point of origin of an IP communication. Neither the California PUC nor the companies themselves identify the precise methods used to provide these services, but it appears that the alleged tracing is accomplished using bits and pieces of information gleaned from public databases regarding the location of some portion of an IP-enabled services provider's network (*e.g.*, a server), not the actual location of the end user, who may be accessing that network from a different state or country. California PUC Comments at 35-36. Notably, the California PUC wisely chooses not to vouch for the accuracy of the tracing information. *See id.* Given the scant data provided and its questionable relevance, these supposed tracing services are hardly a reliable basis for an entire regulatory regime.

28/ *See, e.g.*, Nortel Comments at 13-14 n.10 ("[I]t is not currently possible (or feasible) for the network to also track the location of a called party so as to determine where a VoIP call originates and terminates for jurisdictional purposes. Moreover, the same 'connection' may be utilized to call multiple parties/locations simultaneously or sequentially. Thus, it is not possible to categorize VoIP calls as 'interstate' or 'intrastate.'"); *see also* Microsoft Comments at 14; Avaya Comments at 18 ("IP-enabled networks, as currently designed, sometimes cannot determine the physical location of a caller."); BellSouth Comments at 35.

29/ *Pulver Declaratory Ruling* at 3320 ¶ 20.

the very same page that "it is currently not possible for VoIP providers to differentiate among these different types of traffic."[30/]

That concession underscores a critical point. Even if geographic tracking technology *were* developed at some point in the future, mandating its use simply to determine jurisdictional end points would make a mockery of the Commission's and Congress's policy of keeping the Internet unregulated.[31/] As the Commission recognized in the *Pulver Declaratory Ruling*, "[a]ttempting to require [a service provider] to locate its members for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on this service for the sake of regulation itself, rather than any particular policy purpose."[32/] The Commission should likewise reject regulation for the sake of regulation here.

There is also no merit to the nebulous argument of a few states that, even if IP-enabled services cannot be separated accurately into interstate and intrastate components, regulators should concoct allocations or other administrative formulae to divide jurisdiction between federal and state authorities.[33/] Such "allocations" have historically been used for purposes of ensuring adequate *cost recovery* across both federal and state jurisdictions *after* the lawfulness of dual jurisdiction has already been established.[34/] IP-enabled services, however, are indivisibly

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[30/] Time Warner Telecom Comments at 41.

[31/] Such technology would also raise a variety of consumer privacy issues. *See* Voice on the Net ("VON") Coalition Comments at 21 (stating that in light of the geographic indeterminacy of IP and Internet communications, "[a]ny attempt by the provider to determine the content or jurisdiction of the transmission necessarily raises significant privacy issues that do not exist in the traditional circuit-switched environment").

[32/] *Pulver Declaratory Ruling* at 3321 ¶ 21; *see also, e.g.*, PointOne Comments at 9; *cf. Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825 ¶ 43 (refusing to force carriers to "extract" a telecommunications service from every information service).

[33/] California PUC Comments at 37-38; NYDPS Comments at 10.

[34/] *See, e.g., Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930).

interstate and, as discussed below, the exercise of state jurisdiction over these services would almost always unlawfully negate important federal policy goals.[35/] Thus, absent a lawful basis for state jurisdiction over IP-enabled services, there can be no "allocation" of jurisdictional authority to state regulators.

In the end, the advocates of dual federal-state jurisdiction (primarily state commissions) fall back on their "quacks like a duck" argument — the notion that because IP-enabled services can be used to provide functionalities that resemble traditional circuit-switched telephony, they should be regulated the same way.[36/] But, again, this argument misses the point: before the states can regulate a service, they must first establish that they have jurisdiction over it. Contrary to the claims of some commenters, the fact that IP-enabled services and platforms can be used to run *applications* (such as voice or video) that, in some instances, may provide users with the "look and feel" of traditional, jurisdictionally severable telecommunications services does not mean that these IP-enabled services have a separate intrastate component susceptible to state regulation.[37/]

Moreover, IP-enabled services do not, in fact, quack like a duck; rather, they completely transcend the functionality provided by traditional telephony, and will increasingly do so in the future. As Nuvio explains:

> IP-enabled services, and in particular VoIP applications, involve dynamic and ever-changing technologies and service architectures that cannot fit neatly into

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[35/] *See infra* Section I.B.

[36/] *See, e.g.*, California PUC Comments at 34; *see also* Wisconsin PSC Comments at 3 (arguing that whether an IP-enabled service is regulated should turn on whether it is "public" or private," a distinction that should "be determined by how the service presents itself to the user"). These commenters use the same reasoning in support of their efforts to have VoIP classified as a telecommunications service. That argument is discussed *infra* Section II.B.

[37/] SBC Comments at 35; *see also* Z-Tel Comments at 13.

> pre-defined categories of services that would make only some providers subject to regulation. Because the technology is still in its infancy, the extent of its service applications and features or functionality cannot be adequately determined or anticipated. Many VoIP provide[r]s will offer unique, consumer-driven services that will make categorization based on features or functionality essentially impossible.[38/]

The comments are replete with illustrations of this enhanced (and evolving) functionality. For example, AT&T states that "VoIP would allow an architect to discuss drawings with a client and change those drawings simultaneously, in real time, on a single platform."[39/] BellSouth points out that innovations with respect to VoIP are occurring every day, and notes that "[s]ome of the anticipated features and functionality include Web-based customization that enables the user to set special ring tones for different callers, instant line provisioning, customized call-blocking, more advanced unified messaging and message management capabilities, and video-conferencing."[40/] Thus, any attempt to recognize a separate sphere of state jurisdiction over IP-enabled services, even if doing so were practicable now, could only be temporary, since the technology underlying these services will inevitably evolve in ways that ultimately eliminate the very basis for that state-level regulatory authority.

[38/] Nuvio Comments at 4.

[39/] AT&T Comments at 10.

[40/] BellSouth Comments at 28; *see also* Written Statement of Jeffrey J. Carlisle Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, United States House of Representatives at 2 (July 7, 2004) ("Carlisle Written Statement") ("VoIP is much more than an alternative way of making a 'phone call' — it is an alternative way of doing business. Saying VoIP is just another way to make a phone call is very much like saying that Amazon.com is simply an alternative technology for selling books, without any broader consequences for markets or consumer behavior.").

B. The Commission Should Preempt Any State Regulation of IP-Enabled Services That Negates the Federal Policy of Unregulation.

As SBC explained in its opening comments,[41] the Commission not only should exempt IP-enabled services from common carrier regulation under federal law, but should preempt any state-level counterparts to such regulation as irreconcilable with federal policy in this area. While the Commission must accommodate valid state interests that are *consistent* with federal policy,[42] it is specifically empowered to preempt those state regulations that would "negate valid FCC regulatory goals" with respect to inseverably interstate communications.[43] Here, precisely because the Commission has exclusive jurisdiction over IP-enabled services for the reasons discussed above, it can and should preempt any state efforts to impose common carrier regulation or, for that matter, any other form of state regulation that would burden the IP-enabled services marketplace.[44] Indeed, the *failure* to preempt such state regulations would be directly contrary to Congress's directive that the Internet and other interactive computer services remain "unfettered by Federal or State regulation."[45] Failure to preempt would also be contrary to Congress's and the Commission's express goal of promoting the development of advanced broadband services.[46]

41/ SBC Comments at 43-47.

42/ *See California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) ("*California III*").

43/ *Id.* at 931; *see also NARUC v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (noting that preemption is warranted when state action "negates the exercise by the FCC of its own lawful authority over interstate communication"); *GTE Order* at 22481 ¶ 28; *Pulver Declaratory Ruling* at 3320 ¶ 20.

44/ *See, e.g.*, SBC Comments at 43; NCTA Comments at 41; BellSouth Comments at 33; Verizon Comments at 39; Qwest Comments at 31.

45/ 47 U.S.C. § 230(b)(2).

46/ *Id.* § 157 notes.

As other commenters note, the Commission has already reached essentially that conclusion in the *Pulver Declaratory Ruling*.[47/] The Commission there recognized that state regulation of Internet-related information services is inconsistent with Congress's "clear statements about leaving the Internet and interactive computer services free of unnecessary federal and state regulation."[48/] That is true across the board for IP-enabled services generally: an appropriate preemption policy is necessary to protect incentives to invest in the development of such services and to honor Congress's vision of a market unfettered by regulation. A broad cross-section of the industry thus concurs in the need for certainty that service providers will not have to conform their business and engineering plans to a patchwork of conflicting state regulations.[49/] Indeed, as Verizon argues, preemption will often be necessary to prevent impermissible burdens on interstate commerce,[50/] as the Commission itself recognized in the *Pulver Declaratory Ruling*.[51/] Finally, even a number of forward-looking state regulators agree that a uniform deregulatory policy for IP-enabled services is needed to send an "unambiguous signal to the market that the U.S. is receptive to emerging communications technologies."[52/]

47/ *See, e.g.*, Level 3 Comments at 17-18; MCI Comments at 23-24; NCTA Comments at 33-34.

48/ *Pulver Declaratory Ruling* at 3323 ¶ 25.

49/ *See, e.g.*, NCTA Comments at 33-41; CTIA Comments at 4; BellSouth Comments at 33-34; Microsoft Comments at 14-16; PointOne Comments at 11; Level 3 Comments at 13.

50/ Verizon Comments at 39-40.

51/ *Pulver Declaratory Ruling* at 3322 ¶ 23.

52/ FERUP Comments at 8; *see also* Office of the Attorney General of Texas ("Texas AG") Comments at 14-16 (acknowledging that legacy regulation should not be presumed to apply to IP-enabled services). The Commission also has previously recognized that limiting regulation may stimulate technology. *Pulver Declaratory Ruling* at 3319 ¶ 19 ("We find that granting Pulver's petition and declaring FWD to be an unregulated information service subject to Commission jurisdiction will facilitate the further development of FWD and Internet applications

Some opponents of preemption point to various statutory provisions and doctrines that, they say, demonstrate a lack of congressional intent to occupy the field of telecommunications regulation to the exclusion of the states.[53/] These arguments essentially boil down to the unremarkable proposition that the Act preserves state regulatory authority over purely *intrastate* matters.[54/] No one argues to the contrary. Here, however, it is impossible to separate IP-enabled services into discrete "interstate" and "intrastate" spheres of regulation for the reasons discussed above, and the cited provisions are thus wholly inapposite.

Nor may the states escape preemption by purporting to agree with the Commission that a "light touch" is appropriate for regulating IP-enabled services.[55/] For example, one commenter

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like it and these offerings, in turn, will encourage more consumers to demand broadband service.").

53/ *See, e.g.*, National Association of Regulatory Utility Commissioners ("NARUC") Comments at 10. Oddly, the Vermont Public Service Board argues that the Commission lacks the authority to preempt state regulation of information services. Vermont PSB Comments at 30-31. This wholly unsupported argument flies in the face of extensive precedent affirming the Commission's ability to preempt such regulations. *See, e.g.*, *Pulver Declaratory Ruling* at 3320 ¶ 20; Report and Order, *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, 6 FCC Rcd 7571, 7632 ¶¶ 122-24 (1991); *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003).

54/ These arguments take various forms. Some claim that, because parts of the Act expressly provide for exclusive Commission authority, concurrent state authority should be presumed in all other parts. *See, e.g.*, NARUC Comments at 10 (citing §§ 276, 332(c), and 251(e) of the Act). Others argue that the 1996 amendments showed Congress's intent to preserve state authority. *See, e.g.*, NARUC Comments at 10 (citing §§ 261, 252(e)(3), 253(b), 254(i), 153(41), 601(c)); California PUC Comments at 31; New York Department of Public Service ("NYDPS") Comments at 6; *see also, e.g.*, California PUC Comments at 33 (noting that the Dormant Commerce Clause does not trump Congress's reservation of state authority); NYDPS Comments at 7 (arguing that section 230 of the Act should be read narrowly (*i.e.*, to address content regulation)).

55/ *See, e.g.*, NYDPS Comments at 3 ("The NYDPS shares the Commission's concern that unnecessary regulatory requirements may delay deployment of desirable new capabilities and services."); Vermont PSB Comments at 28 ("State regulation may in fact impose only minimal burdens on IP-Enabled services."); Virginia State Corporation Commission Staff ("Virginia

argues that the New York Commission's effort to regulate Vonage is harmless on the theory that Vonage will be free to seek waivers of that commission's regulations.[56/] As an initial matter, it is a curious argument that says state regulatory authority must be preserved so that it may be waived. In any event, even a so-called "light touch" may feel quite heavy when cumulatively applied by regulators in 51 different jurisdictions, each with a distinct idea of what constitutes "light."[57/] And, as SBC previously explained, the proliferation of so-called light touches has begun. At least 18 states have begun taking positions and issuing decisions regarding the regulatory classification and treatment of specific VoIP services or are actively contemplating whether to do so.[58/] Absent a strong and decisive declaration of preemption from this Commission, there is little doubt that these efforts will impede the development of IP-enabled services.

Indeed, some states hint in their comments at more aggressive plans for regulation of IP-enabled services. For example, the Wisconsin Commission suggests it must play a role in ensuring "that service providers (broadband and VOIP provider alike) will provide these services

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SCC") Comments at 20 ("States have a strong incentive to work with the FCC to ensure that no unnecessary burdens are placed on emerging new technologies."); Wisconsin PSC Comments at 6-7 (stating that "regulatory compliance can and often does have a stabilizing effect on new market goods and services" and citing FDA approval in the food and drug industry as an example).

56/ CenturyTel Comments at 26.

57/ *Cf. Pulver Declaratory Ruling* at 3323 ¶ 25 ("[I]f Pulver were subject to state regulation, it would have to satisfy the requirements of more than 50 state and other jurisdictions with more than 50 different certification, tariffing and other regulatory obligations."). But to some regulators, this is the answer to the "problem" of IP-enabled services' mobility. Responding to Vonage's concern that it cannot know the physical location of its customers, the staff of the Virginia Commission recommends that Vonage submit to the burden of being regulated in every state. Virginia SCC Comments at 14 ("[T]here is no reason that Vonage or other IP-telephony providers could not seek authority to provide intrastate service in all states.").

58/ SBC Comments at 46; *see also, e.g.*, CTIA Comments at 5; Net2Phone Comments at 18; PointOne Comments at 11; VON Coalition Comments at 22-23.

to all Wisconsin consumers interested in obtaining them[.]"[59/] San Francisco also is admirably candid on this point:

> The City recognizes that regulations impose costs on the regulated industry, and those costs may have an impact on the rate of development. . . . The City believes that it is in the interest of all parties to have VoIP services introduced into the market at a measured pace — only when providers are capable of offering service[s] that are sustainable in a regulated environment — than to encourage rapid deployment that puts in jeopardy existing policies and programs that protect the public interest.[60/]

The fact that state or local policymakers would even contemplate — let alone advocate — sustaining regulatory barriers that slow the deployment of innovative new services to some regulatorily determined "measured pace" should set off alarm bells at the Commission. Such command-and-control dictates for how and when new technology and services should be deployed is anathema to the "vibrant and competitive free market that presently exists for the Internet and other interactive computer services" and is in direct conflict with Congress's directive that this market remain "unfettered by Federal or State regulation."[61/] Indeed, it is precisely because of state efforts to control the development of these services that preemption is so urgently needed.[62/]

Moreover, concerns that preemption will deny states an appropriate role in protecting their citizens are overblown. For example, consumer protection rules of general application would in most cases not conflict with the Commission's rules and would not be presumptively

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[59/] Wisconsin PSC Comments at 4-5.

[60/] City and County of San Francisco Comments at 14.

[61/] 47 U.S.C. § 230(b)(2).

[62/] *See, e.g.*, *Pulver Declaratory Ruling* at 3320 ¶ 19 n.70 ("Any state attempt to impose economic or other regulations that treat FWD like a telecommunications service would impermissibly interfere with the Commission's valid federal interest in encouraging the further development of Internet applications such as these, unfettered by Federal or state regulation, and thus would be preempted.").

preempted.[63/] Further, it is hardly the case that preemption would strip the states of *any* role in the regulation of IP-enabled services, as states may participate in Commission proceedings such as this one, and may also provide their recommendations to the Commission through a variety of Federal-State Joint Boards and Joint Conferences. In addition, the states can and in some cases already do participate in industry-wide efforts to develop technological solutions and voluntary standards.[64/]

Finally, several commenters, including AT&T and NCTA, argue that any preemption decision should be limited to ensure, for example, that states retain authority over interconnection disputes and access to unbundled network elements.[65/] The preemption contemplated in this proceeding, however, would have no effect on such state authority. The issue here is not preemption of UNE requirements for any telecommunications services or facilities that may underlie IP-enabled services, but preemption of state regulation of IP-enabled services and facilities themselves, such as IP routers. As discussed in the next section, the latter are not subject to sections 251 and 252 to begin with, because they are not used in the provision of a "telecommunications service" and thus do not qualify as "network elements."[66/] In all events, preemption of state economic regulation over IP-enabled services will not deprive states

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[63/] SBC Comments at 44.

[64/] For example, the state of Vermont and a county 911 board in Texas are members of the Alliance for Telecommunication Solutions ("ATIS"), with which the industry is working to develop national 911 standards. *See* http://www.atis.org/atismembers.shtml; *see also* infra Section VI.B (discussing voluntary efforts to develop national 911 standards).

[65/] *See, e.g.*, AT&T Comments at 44-45; NCTA Comments at 41.

[66/] In addition, many of these facilities are packetized and are thus not subject to unbundling based on the Commission's decision's regarding certain packetized facilities in the *Triennial Review Order*. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17111 ¶ 213 (2003) ("*Triennial Review Order*"), *vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004)

of any otherwise appropriate role they may derive from section 252 over access to basic telecommunications facilities and services.

II. IP-ENABLED SERVICES MEET THE STATUTORY DEFINITION OF AN INFORMATION SERVICE.

There is widespread agreement that IP-enabled services satisfy the Act's definition of an information service. The vast majority of IP-enabled services offer the capability to generate, transform, store and/or process information in ways not previously possible with circuit-switched services. This inherent capability to control and manipulate information is a core characteristic of an information service under the Act. Moreover, classifying IP-enabled services as information services is not only consistent with the statute, but also with the view, likewise shared by a large number of commenters, that regulation (and particularly economic regulation) of such services would be both burdensome and unnecessary. Indeed, as many commenters recognize, classification of all IP-enabled services as information services will subject them to a presumption of unregulation.

A. IP-Enabled Services Are Properly Classified as Title I Information Services.

A large number of commenters — including ILECs, CLECs, and other providers of IP-enabled services — agree that IP-enabled services should be classified as "information services" under the Act based on the range of capabilities they provide to end users.[67/] This conclusion directly follows from the statutory definition of "information services" and Commission precedent interpreting that term, including (but by no means limited to) the recent analysis of

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67/ *See, e.g.*, AT&T Comments at 15-16; BellSouth Comments at 26-28; Comcast Comments at 12; MCI Comments at 21-22; NCTA Comments at 8; Qwest Comments at 14; Vonage Comments at 23.

Pulver's Free World Dialup ("FWD") service.[68/] As many commenters note, almost all IP-enabled services offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," bringing them squarely within the Act's definition of an information service.[69/] This will be even more indisputably true as IP-enabled services evolve to include a wider array of enhanced applications.[70/]

Thus, it should be a straightforward matter for the Commission to conclude that IP-enabled services are properly regulated under Title I of the Act as information services.[71/] And as commenters further agree, that determination would allow the Commission to establish a presumption against regulating such services, thereby ensuring regulatory certainty and encouraging rather than discouraging investment and innovation.[72/] Indeed, many commenters credit the Commission's hands-off policy — adopted over twenty years ago[73/] and reinforced by

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68/ *Pulver Declaratory Ruling* at 3313-14 ¶ 11.

69/ 47 U.S.C. § 153(20). Additionally, many IP-enabled services involve or include the potential for protocol conversion, although this need not be an *essential* aspect of the inquiry, as SBC noted in its opening comments. *See* SBC Comments at 34 n.77.

70/ *See, e.g.*, Qwest Comments at 10-11.

71/ Several commenters also endorse SBC's position in its forbearance petition that, to the extent a particular service does not fall squarely within the "information services" category, the Commission should forbear from regulating it as a Title II telecommunications service. *See, e.g.*, AT&T Comments at 16; Verizon Comments at 29-31; BellSouth Comments at 56-57. SBC further addresses those arguments in its separately filed reply comments in support of that petition.

72/ *See, e.g.*, AT&T Comments at 15; MCI Comments at 21; BellSouth Comments at 26; Qwest Comments at 14; Time Warner Telecom Comments at 16.

73/ *See, e.g.*, Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 387 ¶ 7 (1980) ("*Computer II*") ("[T]he absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.").

Congress in the Telecommunications Act of 1996[74/] — for the enormous success of the Internet and IP-enabled services thus far.

As SBC explained in its opening comments, the category of "IP-enabled services" should be understood to include only those services that reach or leave the end user's premises in IP format.[75/] This bright-line, competitively neutral test therefore is most likely to capture those services that will satisfy the functional definition of an information service. It also offers a high level of certainty to providers and consumers concerning the regulatory obligations that will be associated with these services while remaining sufficiently broad and versatile to accommodate future innovations.

B. Voice-Capable IP-Enabled Services Are Not Telecommunications Services.

Some commenters — primarily, though not exclusively, state regulatory authorities — suggest that VoIP should be singled out from all other IP-enabled services and regulated as a telecommunications service, even if all other IP-enabled services are classified as information services and even if a particular VoIP service comes with enhanced functionalities.[76/] The general theory underlying this view is that VoIP is the "functional equivalent" of traditional voice telephony, and thus must be regulated in precisely the same way as circuit-switched

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[74/] *See, e.g.*, 47 U.S.C. § 230(b)(2) (declaring that "[i]t is the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

[75/] SBC Comments at 21-22. In other words, the communication between the end user and the service provider must be in IP format. Thus, for example, if an end user originates an IP communication on CPE on its premises, and converts that communication to circuit-switched format before it crosses the demarcation to a service provider's network, the communication would not qualify as an IP-enabled service.

[76/] *See, e.g.*, Time Warner Telecom Comments at 16; NARUC Comments at 4-5; California PUC Comments at 14; NYDPS Comments at 4-5.

telephone service. Cable companies likewise propose singling out VoIP for special regulatory treatment, though without expressly categorizing it as a telecommunications service.[77/]

These arguments miscomprehend the analysis employed to classify a particular service and misrepresent the nature of VoIP services generally. While the Commission has focused on the specific functions that a service affords to end users to determine that service's regulatory classification,[78/] that approach does not mean that any service that offers voice functionality must automatically be considered a telecommunications service. Rather, such a service *cannot* be considered a telecommunications service under the Act and the Commission's precedent if it also offers other, enhanced functionalities. In other words, the service must be seen as a whole, not disassembled and regulated in piece parts. As the Commission has explained, a service's classification "depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service."[79/] Thus, for example, the Commission found that Pulver's VoIP service was an information service, even though it supported voice communications, because it included a variety of "computing capabilities."[80/] The view that such a service should be considered a

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[77/] *See, e.g.*, NCTA Comments at 9.

[78/] *See, e.g.*, First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21976 ¶ 145 (1996); *see also* Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11530 ¶ 59 (1998) ("*Report to Congress*").

[79/] *Report to Congress* at 11530 ¶ 59.

[80/] *Pulver Declaratory Ruling* at 3313-14 ¶ 11.

telecommunications service because it includes a voice application simply tosses aside the Act and established Commission precedent.

Also, as noted above, IP-enabled services are *not* the functional equivalent of traditional telecommunications services.[81/] Quite to the contrary, the vast majority of IP-enabled services offer the inherent capability to generate, transform, store and/or process information, and thus qualify as information services under the Act. Attempting to carve out voice-based applications from the universe of IP-enabled services and treating those applications as telecommunications services would actually disserve public policy, particularly where the voice application is integrated with other applications. Forcing providers to offer IP-based voice functionality as a separately regulated component subject to different requirements from those to which other applications that might be part of a single integrated service offering are subject would impose additional costs on providers solely for regulatory purposes, undermining competition and harming consumers.[82/] As those various functionalities become ever more intertwined, singling out the voice application for specialized regulatory treatment will become less and less feasible. Thus, application of a functional equivalence or substitutability test proposed by some commenters[83/] will become increasingly awkward, and its results less precise, as these services develop over time. Indeed, to separate the voice and data functions of VoIP would be like separating the audio and video functions of television, and subjecting those functions to different regulatory regimes. Such a result would be unnecessarily cumbersome and would subvert any effort to bring clarity to regulation in the context of IP-enabled services.

81/ *See supra* Section I.A.

82/ *See* Verizon Comments at 29; BellSouth Comments at 35.

83/ *See, e.g.*, Time Warner Inc. Comments at 13; Level 3 Comments at 36.

III. THE COMMISSION HAS AMPLE AUTHORITY TO APPLY SPECIFIC REGULATIONS TO IP-ENABLED SERVICES WHERE APPROPRIATE, AND IT SHOULD LIMIT SUCH REGULATION, AT LEAST INITIALLY, TO THOSE SERVICES THAT CONNECT WITH THE PSTN.

Classification of IP-enabled services as information services in no way disables the Commission from addressing any of the important public policy concerns that they may implicate. Rather, as many commenters observe, the Commission can impose narrowly tailored regulations on such services pursuant to its Title II non-carrier-specific jurisdiction or its Title I ancillary jurisdiction. Although it has such authority, the Commission need not and should not impose regulations on all IP-enabled services; instead, consistent with an unregulatory or "light-touch" approach, the Commission should differentiate among the various IP-enabled services so that it can identify those that raise relevant concerns and target its regulatory responses accordingly. At least initially, this category should include those services that interconnect with the PSTN. While some commenters suggest alternative criteria or frameworks to guide the Commission's consideration of when regulation may be warranted, those proposals would either substantially limit the Commission's flexibility to craft appropriate regulatory solutions or are designed simply to reinforce or even expand legacy regulatory distinctions and obligations that have no place in the regulatory framework for IP-enabled services.

A. The Commission Has Ample Authority to Address Important Public Policy Issues Implicated by IP-Enabled Services Even If They Are Classified as Information Services.

Notwithstanding concerns expressed by some commenters, if the Commission characterizes IP-enabled services as "information services," as it should, it will retain ample regulatory authority from three sources to meet its policy objectives for those services.[84/] First,

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84/ SBC Comments at 52-57.

the Commission's existing statutory authority over common carrier services will often suffice to address issues relating to an IP-enabled services provider's use of the PSTN on the non-IP end of particular transmissions. Second, as discussed in SBC's opening comments, several critical provisions of Title II authorize the Commission to regulate non-common carrier services or functions with respect to such issues as numbering resources, 911 functionality, universal service contributions, and disability access.[85/] This "non-carrier-specific" Title II jurisdiction enables the Commission to tailor appropriate regulatory requirements for IP-enabled services regardless of how they are classified. Third, the Commission may fill any remaining gaps in the preceding sources of authority by exercising its Title I ancillary jurisdiction. As discussed below, the Commission has long applied that authority to information services, and the contrary suggestions of some commenters are flatly out of step with controlling Commission and judicial precedent.

Many commenters, from all sections of the industry, agree with SBC that the Commission has these multiple tools for crafting appropriate regulations for IP-enabled services once they are classified as "information services." They note that the Commission's authority to regulate common carriers may be used to resolve disputes between providers of telecommunications and information services.[86/] Others recognize that several requirements of Title II may be applied directly to non-common carriers. AT&T and NCTA, for example, affirm that the Act empowers the Commission to address numbering and universal service, even if the regulated entities are information service providers.[87/]

85/ *Id.* at 50-52.

86/ Cox Communications Comments at 24 (discussing 47 U.S.C. §§ 201, 202).

87/ *See, e.g.*, AT&T Comments at 39 (universal service); NCTA Comments at 28-29 (numbering). Curiously, Sprint suggests that section 254 somehow precludes the extension of universal service obligations to information services. Sprint Comments at 30. But the law clearly provides that "[a]ny other provider of interstate telecommunications may be required to

Likewise, many commenters recognize the Commission's authority to discharge its statutory duties with regulations that are "reasonably ancillary to the effective performance of the Commission's various responsibilities."[88/] As discussed in SBC's opening comments, the Commission has built a 40-year body of precedent for exercising its ancillary authority to regulate new services that slip between the cracks of the Act's substantive Titles to the extent that those services compete with and replace existing services already regulated under one of those Titles or directly affect the Commission's abilities to serve the Act's goals. Here, that principle permits the Commission to regulate those aspects of IP-enabled services that may replace and draw traffic from the PSTN.

There can be no serious doubt on that score. In *Computer & Communications Industry Association v. FCC*, the D.C. Circuit specifically affirmed the Commission's exercise of its ancillary authority over information services to the extent they bear on telecommunications services more generally.[89/] To the extent that IP-enabled services complement, enhance, and

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contribute to the preservation and advancement of universal service if the public interest so requires." 47 U.S.C. § 254(d). Sprint makes a similar countertextual argument with respect to numbering. Sprint Comments at 30. Here, Sprint fails to acknowledge that section 251(e) grants the Commission authority over the entity designated to "administer telecommunications numbering." 47 U.S.C. § 251(e)(1); *see also* Cox Communications Comments at 24 n.32 ("The Commission need not invoke Section 4(i) to make numbering resources available. . . . Nothing in Section 251(e) precludes assignments to non-carriers."). As SBC explained in its opening comments, the Commission need not resort to ancillary jurisdiction to regulate in either area. SBC Comments at 50-52.

88/ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Multiple commenters recognize that this authority gives the Commission flexibility to regulate IP-enabled services as information services. *See, e.g.*, NCTA Comments at 24; BellSouth Comments at 29; Qwest Comments at 37; Cox Communications Comments at 23. Even MCI, which cautions the Commission against an overly broad interpretation of its ancillary authority, agrees that ancillary jurisdiction may be applied to IP-enabled voice applications. MCI Comments at 34-35.

89/ *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982) ("*CCIA*") (upholding Commission's "exercise of ancillary jurisdiction over . . . enhanced services").

substitute for legacy voice services, they will affect the use, quality, and economic viability of those legacy services. Regulation of those IP-enabled services is thus "reasonably ancillary" to the Commission's existing Title II authority over telecommunications networks generally, just as, in *Southwestern Cable*, the Commission's assertion of Title I authority was necessary to address the effect of cable television on the legacy television broadcasting system.[90/]

Sprint contends, however, that Congress somehow manifested an intent to preclude regulation of information services by drawing an explicit statutory distinction between such services and "telecommunications services" and by specifying that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."[91/] That provision, however, merely insulates a provider from any argument that, by virtue of its characterization as a "telecommunications carrier" in some markets, it is automatically subject to the same set of Title II common carriage regulations whenever it enters other markets not traditionally subject to such regulation.[92/] But nothing in the statute suggests that Congress meant to preclude the Commission's long-settled authority to exercise its *Title I* authority to fill the interstices of the Communications Act in response to new types of services.

90/ *Southwestern Cable*, 392 U.S. at 177; *see also FCC v. Midwest Video Corp.*, 440 U.S. 689, 706-07 (1979) ("*Midwest Video II*") ("[In *Southwestern Cable*] regulation was imperative to prevent interference with the Commission's work in the broadcasting area."); *GTE Service Corp. v. FCC*, 474 F.2d 724, 734 (2d Cir. 1973) ("[In *Southwestern Cable*] the authority of the FCC . . . was based on the need to control the growth of community antenna systems in order that the Commission might accomplish its broad responsibility of orderly development of an appropriate system of local television broadcasting."). To say the least, this clear history undermines Sprint's citation-free warning that ancillary jurisdiction "is sometimes misunderstood (or misconstrued) to permit the assertion of jurisdiction over entities and activities that impinge upon or otherwise affect regulated enterprises or regulatory goals." Sprint Comments at 29.

91/ Sprint Comments at 40 (quoting 47 U.S.C. § 153(44)).

92/ *Cf. WorldCom, Inc. v. FCC*, 246 F.3d 690, 694-95 (D.C. Cir. 2001).

There is similarly no merit to Sprint's use of the "*expressio unius*" canon to argue that the Commission lacks authority to impose particular types of regulations on information service providers when Congress has separately *required* the Commission to impose those types of regulations on telecommunications carriers.[93/] Congress passed the 1996 Act fully aware of the judicial rulings — *Southwestern Cable*, *CCIA*, and their progeny — affirming the Commission's broad ancillary jurisdiction.[94/] Congress has cast no doubt on the continued validity of those precedents and imposed no restrictions on the Commission's ability to "make such rules and regulations . . . as may be necessary in the execution of its functions."[95/] Indeed, the Commission's ancillary authority would be superfluous if it were read so narrowly as to be available only where Congress explicitly directs the Commission to regulate.

Shortly after the 1996 Act was passed, moreover, the D.C. Circuit rejected an analogous "*expressio unius*" argument in *Mobile Communications Corporation of America v. FCC*.[96/] The court held that the *expressio unius* "maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has '*directly* spoken to the *precise question at issue.*'"[97/] Indeed, rote application of the canon would have compelled the Supreme Court to deny the existence of ancillary jurisdiction in *Southwestern Cable* — a result

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93/ Sprint Comments at 31; *see also* California PUC Comments at 39 (arguing that classification of IP-enabled services as information services would remove the predicate of the Commission's ancillary jurisdiction authority).

94/ SBC Comments at 54-56.

95/ 47 U.S.C. § 154(i).

96/ *Mobile Communications Corp. of Am. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996) (upholding Commission's authority, but remanding in light of the specific manner in which the Commission exercised that authority).

97/ *Id.* at 1404-05 (quoting *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842 (1984))) (emphases added).

the Court clearly rejected. Restrictions of this nature cannot be applied if the Commission is to adapt to an ever-changing technological landscape. Thus, it is not surprising that courts have recognized that "Congress sought 'to endow the Commission with sufficiently elastic powers such that it could readily accommodate dynamic new developments in the field of communications.'"[98/]

No contrary conclusion can be drawn from the handful of cases in which the courts have rejected the Commission's exercise of its ancillary authority. Time Warner Telecom claims that the Supreme Court's decision in *Midwest Video II* bars the imposition of Title II-style regulations on an information service.[99/] But that argument completely misreads *Midwest Video II*. In that case, the Court prevented the Commission from imposing common carrier-style regulations on cable providers because Title III of the Act — on which the Commission sought to rely as the source of its ancillary authority — *expressly precluded* the Commission from applying such regulations to broadcasters, and it would have been inappropriate for the agency's ancillary authority to have exceeded the direct authority from which it derived.[100/] Time Warner Telecom's reliance here on *Midwest Video II* would make sense only if the Commission were attempting to impose a type of regulation on IP-enabled services providers that Congress *barred* it from applying to providers of circuit-switched telephony. The Act, however, contains no

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[98/] *Computer & Communications Indus. Ass'n*, 693 F.2d at 213 (quoting *General Tel. Co. v. United States*, 449 F.2d 846, 853 (5th Cir. 1971)).

[99/] *See* Time Warner Telecom Comments at 35 (citing *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video II*")).

[100/] *Midwest Video II*, 440 U.S. at 708-09 ("The Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters."); *see also NARUC v. FCC*, 533 F.2d 601, 615-17 (D.C. Cir. 1976) (rejecting the Commission's assertion of its ancillary jurisdiction to preempt state regulation of two-way non-video communications via cable, finding that the operations in question were not ancillary to Commission's authority over broadcasting).

analogous limitations that would bar the Commission from applying appropriate Title II-style regulations to information services where necessary to discharge its duties.[101/]

For similar reasons, the D.C. Circuit's decision in *Motion Picture Association of America v. FCC* has no bearing on the Commission's ability to regulate information services.[102/] At issue there was the Commission's effort to enact "video description" rules that Congress had considered — but decided against — authorizing the Commission to adopt. The court made abundantly clear that its holding was confined to the special concerns raised by FCC regulation of television programming. In particular, it held, "[t]o avoid potential First Amendment issues, the very general provisions of § 1 have not been construed to go so far as to authorize the FCC to regulate program content."[103/] Those First Amendment concerns — together with the fact that "[a]fter originally entertaining the possibility of providing the FCC with authority to adopt video description rules, Congress declined to do so"[104/] — led the court to invalidate the Commission's rules. No analogous concerns arise here. Any needed exercise of the Commission's ancillary jurisdiction over IP-enabled services would not involve regulation of "program content." And Congress has been silent on the scope of the Commission's Title I jurisdiction over IP-enabled services not because, by analogy to *MPAA*, it considered and rejected statutory endorsement of

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101/ Microsoft similarly misreads precedent in citing *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994), as a limitation on the Commission's authority to use ancillary jurisdiction. Microsoft Comments at 12. In that case, which involved the Commission's ability to regulate "dark fiber," the court expressly declined to consider the scope of the Commission's ancillary authority. *Southwestern Bell*, 19 F.3d at 1484 ("[W]e do not decide today whether the Commission may draw on other authority, *such as its ancillary jurisdiction*, to regulate petitioners' services.") (emphasis added).

102/ *Motion Picture Association of Am. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

103/ *Id.* at 805.

104/ *Id.* at 806.

such authority, but because it simply did not envision the widespread proliferation of VoIP and similar IP-enabled services when it enacted the 1996 Act.

Finally, Title I is a particularly appropriate source of authority for creating narrowly tailored regulations for IP-enabled services. The Internet owes its remarkable development in part to freedom from intrusive regulation. By restricting regulation to those instances in which it is needed to implement express statutory policies, the Commission can best fulfill Congress's goal of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," while retaining the flexibility to act when necessary.[105/]

B. To the Extent That Some Regulation of IP-Enabled Services is Warranted, the Commission Should Limit That Regulation, at Least Initially, to Those IP-Enabled Services That Interconnect with the PSTN.

While the Commission has the authority to address regulatory concerns for IP-enabled services generally, the unregulatory framework that Congress mandated for such services is best served by a targeted, "regulate only as necessary" approach. Accordingly, the Commission should carefully differentiate among IP-enabled services so that it can identify, and craft regulatory solutions for, only those IP-enabled services that in fact raise particular concerns.

As SBC set forth in its opening comments, as a general matter, the minimum, "gating" criterion (at least for the foreseeable future) that the Commission should use to determine whether a particular IP-enabled service should be subject to regulations that address public policy concerns should be whether that service interconnects with the PSTN.[106/] Such "interconnected" services are (and are increasingly becoming) part of the seamless and

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105/ 47 U.S.C. § 230(b)(2).

106/ *See* SBC Comments at 58.

ubiquitous communications network that allows all citizens of this country to communicate with one another (and others across the globe). As such, they are most likely to raise issues similar to those raised by legacy circuit-switched services, which make up the bulk of that communications network today. By contrast, IP-enabled services that are not connected to the PSTN, such as Internet backbone services and Internet access services, have historically been entirely unregulated. And other types of newer, "closed" IP-enabled services that are not designed to meet all of a typical subscriber's communications needs, but instead allow for communications only among a specific subset of users, similarly should not raise regulatory concerns, at least as a general matter. Subscribers' expectations with respect to such "closed" services would be very different from those of an end user on the PSTN or a subscriber to a VoIP service connected with the PSTN, both of whom expect to be able to communicate with anyone, for any reason, and in a manner similar to the way they always have communicated over the PSTN.

As SBC previously has explained, PSTN interconnection thus should be a *necessary* criterion for the application of any public policy-based regulations, but it may not be the *only* criterion in all cases. The Commission should adopt additional criteria as necessary to tailor any regulatory requirements narrowly to the services that actually present immediate concerns. For example, as SBC and others discussed in the opening comments, the Commission should adopt "voice capabilities" as an additional criterion for the application of any emergency calling related rules.[107/] At least today, these are the only services as to which consumers are likely to expect emergency calling capabilities.[108/] Thus, emergency calling concerns would be low or

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[107/] *See id.* at 95-98; *see also* Level 3 Comments at 36; BellSouth Comments at 49; Comcast Comments Appendix A at 3-4; Time Warner Inc. Comments at 13.

[108/] *See* Report and Order and Second Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling*

nonexistent for a data-only service, even if it were connected to the PSTN. In other cases — for example, the application of any numbering or number portability rules — the use of NANP numbers would be an obvious necessary criterion.[109/]

Using the PSTN interconnection criterion as an initial cut-off for whether a service might be regulated offers a bright-line, easily implemented test that sidesteps the quagmire that would result from the use of the alternative criteria discussed in the *NPRM* and supported by some commenters.[110/] For example, functional equivalence or substitutability are overly subjective and could be over- or underinclusive. Whether a particular VoIP service is "functionally equivalent" to or substitutable for traditional voice service, for example, is anything but straightforward. Most VoIP services offer far *more* functionality than traditional voice. But some VoIP services, like Pulver's, offer voice services that bear some attributes of traditional voice, yet are offered only within a closed network that cannot communicate with PSTN-based customers. Thus, determining whether an IP-enabled service is "equivalent" to or "substitutable" with traditional telephone service will require a highly fact-intensive, case-by-case examination of that service, leading to a parade of declaratory ruling petitions asking the Commission to judge the "equivalence" or "substitutability" of every new service rolled out in the IP marketplace. The

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Systems, 18 FCC Rcd 25340, 25347 ¶¶ 18-19 (2003) ("*E911 Scope Order*") (consumers expect "real-time, two-way voice service" to offer emergency calling, but not other services).

109/ *See* SBC Comments at 90, 92-93.

110/ *See* Notice of Proposed Rulemaking, *IP-Enabled Services*, 19 FCC Rcd 4863 ¶ 29 (2004) ("*IP-Enabled Services NPRM*"); MCI Comments at 36 (suggesting additional criteria of "IP-based voice services that hold themselves out as substitutes for POTS services, [and] that assign NANP numbers to their customers"); BellSouth Comments at 49 (suggesting additional criterion of NANP telephone number); Time Warner Inc. Comments at 13 (suggesting additional criteria of customers' expectations and competition with traditional CMRS or wireline local exchange service); Level 3 Comments at 36 (suggesting additional criteria of customers' expectations and competition with traditional telephone service).

PSTN-connectivity test is a far more objective and direct approach that offers much greater certainty to providers and consumers alike.

For similar reasons, the Commission also should not adopt the four-part test proposed by cable companies for identifying which VoIP services should be subject to special regulatory requirements.[111/] Although the cable company commenters offer that test as a purported alternative to the functional analysis,[112/] it is still highly subjective in that it calls for, among other things, a determination of whether the service at issue "represents a possible replacement for POTS,"[113/] which again would require a fact-intensive, case-by-case analysis. This test also runs the risk of being overly narrow, applying only to VoIP services that satisfy four separate criteria.[114/] Some of those criteria — such as the use of NANP numbers and interconnection with the PSTN — certainly may be relevant to whether specific regulatory obligations should apply to these services, but they are not all equally relevant with respect to all such potential requirements. For instance, certain services that do not use NANP numbers should nonetheless be required to contribute to universal service, as explained below. Similarly, disability access should not be limited only to voice services. The cable companies' four-part test would unnecessarily limit the Commission's flexibility to craft appropriate regulations for these services, and the Commission should not straight-jacket itself by adopting it.

111/ *See, e.g.*, NCTA Comments at 9 (arguing that a VoIP service should be subject to light regulation if it (1) uses NANP resources, (2) can receive calls from or terminate them to the PSTN at one or both ends of the call, (3) can replace POTS, and (4) uses IP transmission between the service provider and the end user). This test should not be confused with the four-part test described by the Commission for identifying "phone-to-phone" VoIP services that should be regulated as telecommunications services. *See Report to Congress* at 11543-44 ¶ 88.

112/ *See, e.g.*, NCTA Comments at 43.

113/ *Id.* at 9.

114/ *See, e.g., id.*

C. Claims that ILECs Possess Market Power Regarding IP-Enabled Services Are Specious and Provide No Basis for Regulating Such Services.

Although MCI and other commenters support a broad unregulatory approach for their own IP-enabled services, they predictably argue for the continued heavy regulation of the facilities built by their ILEC competitors, including both legacy facilities and any future IP-based facilities developed by ILECs to provide IP-enabled services.[115/] Many of these commenters also engage in hyperbolic attacks on SBC's proposed definition of IP-enabled services, which, as noted above, includes not only those services that reach or leave an end user in IP format but also the IP-specific facilities over which such services are provided, such as the routers that partially constitute IP platforms.[116/] These commenters insist that the Commission adopt a "layered" approach to regulating IP-enabled services to restrain the ILECs' alleged market power with respect to the facilities over which IP-enabled services are provided, as well as any others where they allege some providers have market power.[117/] These arguments should be rejected.

Access to Legacy Facilities. As an initial matter, the classification of IP-enabled services (and the IP-enabled facilities used to provide such services) as largely unregulated, interstate information services will have no effect on access to existing facilities that are *not* IP-specific. To the extent those services and facilities are regulated today, they would continue to be regulated unless and until the Commission concludes that such regulation is no longer necessary. For example, under existing Commission rules, telecommunications carriers would retain access to the local loop as a UNE for the provision of telecommunications services. Such facilities can,

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115/ *See, e.g.*, AT&T Comments at 48; Level 3 Comments at 28; MCI Comments at 11.

116/ *See, e.g.*, AT&T Comments at 52 (stating that "[t]here is no more serious error that the Commission could make" than to adopt SBC's proposed definition of IP-enabled services).

117/ *See, e.g.*, MCI Comments at 10; Z-Tel Comments at 5.

in turn, be used to provide IP-enabled services in appropriate circumstances. Likewise, ILECs would remain subject to existing *Computer II* obligations to provide legacy transmission services (*i.e.*, those that are not IP-enabled) for as long as the Commission deems those requirements necessary. Thus, to the extent some commenters have construed SBC's arguments about IP-enabled services and platforms as calling for decreased regulation of legacy services in this context, they are simply mistaken. Indeed, SBC has consistently maintained that "[a] Commission declaration limiting the scope of Title II regulation [for IP-enabled services] . . . would in no way affect existing regulation of legacy networks and services by either state or federal regulators, or predetermine the outcome of pending proceedings relating to legacy broadband services."[118/]

To the extent CLECs are claiming the right to obtain an ILEC's IP-specific facilities (such as routers) as UNEs, the Act already forecloses that request: such facilities are not "used in the provision of a telecommunications service" and thus do not meet the definition of "network element."[119/] And even if they were used in the provision of a telecommunications service, those IP-specific facilities would not remotely meet the "impairment" test of section 251(d)(2).[120/] As the VoIP Fact Report and many rulemaking comments make abundantly clear,

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118/ Petition of SBC Communications Inc. for a Declaratory Ruling Regarding IP Platform Services, WC Docket No. 04-36, at 50 (filed Feb. 5, 2004).

119/ 47 U.S.C. § 153(29). For similar but distinct reasons, information service providers themselves cannot invoke rights to UNEs under section 251(c)(3), since those UNEs must be used for "the provision of a telecommunications service." *Id.* § 251(c)(3). Such providers can, however, partner with telecommunications carriers who provide the underlying transmission input.

120/ Indeed, as mentioned above, the Commission has already determined that certain packetized broadband facilities are not subject to unbundling.

the development of IP-based facilities is occurring in a highly competitive environment.[121/] This is largely due to the low barriers to entry that characterize this market. And, as several commenters also observe, VoIP technology is inexpensive to deploy as well as more efficient than traditional POTS service.[122/]

IP-Enabled Services. In a classic case of elevating rhetoric over substance, some commenters claim that the Commission should adopt a layered model of regulation to prevent the alleged exercise of "market power" from hindering the development of IP-enabled services. But wholly apart from the flawed market power claims upon which they rest their layered model (discussed below), it is far from certain that a such a layered model is an appropriate paradigm for regulation in the IP environment. As NCTA notes, a layered model "does not, by itself, offer any guidance on whether or how a given layer should be regulated."[123/] Moreover, as SBC noted in its opening comments, there is no consensus about how to define the "layers" of Internet-related communications for either regulatory or engineering purposes.[124/] Indeed, the problems associated with using the layered model as the basis for a regulatory regime continue to inspire much discussion.[125/] Further, a key step in conducting an accurate market power analysis is to

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[121/] *See generally* VoIP Fact Report at 2-11 & App. A; AT&T Comments at 17; Verizon Comments at 18; BellSouth Comments at 20-22.

[122/] *See, e.g.*, Nortel Comments at 15-20; *see also* Carlisle Written Statement at 3 ("Anyone can attach a server to the Internet to allow two people — or three, four, five or a hundred — to talk to one another, just as anyone can connect a server to the Internet to provide email, file sharing, or any other service.").

[123/] NCTA Comments at 43.

[124/] SBC Comments at 61-62.

[125/] *See, e.g.*, David P. McClure, President and Chief Executive Officer, U.S. Internet Industry Association, *Feasibility Issues Inherent in the "Layers" Model for Internet Public Policy* at 11 (New Millennium Research Council July 2004) ("There are any number of facets of the 'Layers Model' that are problematical to its use as a foundation for Internet public policy."); *see generally* New Millennium Research Council, *Free Ride: Deficiencies of the MCI "Layers"*

properly define the relevant market to be studied.[126/] The layers model proposed by some commenters bypasses this step altogether by *broadly assuming in all instances* that the appropriate "market" to be studied is one of the layers in their model. But by effectively equating the terms "layer" and "market," this approach completely ignores important criteria (*e.g.*, product, geography, customer class) for properly determining the contours of the relevant market. As the Commission's analogous experience with the *Triennial Review* proceeding demonstrates, mandating access to facilities without conducting a sufficiently nuanced market analysis is a sure path to reversible error.[127/] The Commission should decline MCI's invitation to wander down this same path again.

Moreover, even if the Commission were to conduct a market power analysis along the lines suggested by proponents of the layered model, the Commission would find that, despite some commenters' suggestions to the contrary, ILECs do not have market power with respect to broadband transmission networks (*i.e.*, the physical layer in the layered model). Cable leads all

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Policy Model and the Need For Principles that Encourage Competition in the New IP World (July 2004) (containing numerous essays by telecommunications experts and economists describing the problems with the layered model).

[126/] *See* Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001); Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2002); Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc. Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, 14 FCC Rcd 14712 (1999).

[127/] Not surprisingly, the most vocal advocates of the layers model are some of the very same companies that urged the Commission to make overbroad findings of "impairment," which ultimately led the D.C. Circuit to reverse the Commission's unbundling rules. *See* MCI Comments at 6-20; AT&T Comments at 15-17; Z-Tel Comments at 14-21.

its intermodal competitors in the mass market for broadband,[128] and IXCs such as AT&T and MCI lead all competitors in the enterprise broadband market by an enormous margin.[129] Yet numerous commenters do not even acknowledge the existence of these leading providers.[130] And while some commenters at least recognize the presence of these providers when they assert that the mass market consists of a "duopoly" consisting of ILECs and cable companies,[131] even that statement mischaracterizes reality. There is no duopoly, as other means of providing broadband transmission (such as satellite, wi-fi, 3G wireless, and powerline) are quickly proliferating,[132] a point most recently reiterated by Chairman Powell.[133] The increased availability of intermodal alternatives reduces any need for regulation at the facilities level, a fact that even proponents of the layered model have been forced to concede.[134] In any event, even if there were a duopoly in last-mile access (and there is not), it would be indefensible to impose disproportionately greater regulation on the provider with the much smaller market share. Thus, if anything, the layered model argues in favor of *decreased* regulation of ILECs at the physical layer.

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[128] *See, e.g.*, VoIP Fact Report at A-1.

[129] *See, e.g., id.* at 28, A-19.

[130] *See, e.g.*, Z-Tel Comments at 14-21.

[131] *See* AT&T Comments at 49; MCI Comments at 13; Covad Comments at 9.

[132] *See, e.g.*, VoIP Fact Report at A-8 to A-19.

[133] *See* Remarks of Michael K. Powell at the University of Tennessee Telehealth Network at 2 (June 30, 2004) ("[B]roadband applications can be delivered over a variety of technology platforms. From wireless, to satellite, to broadband-over-powerline, we are seeing better access technologies develop all the time.").

[134] *See* Richard S. Whitt, *A Horizontal Leap Forward: Formulating A New Public Policy Framework Based On the Network Layers Model* at 45 (MCI Public Policy Paper Mar. 2004) ("Of course, to the extent that competition (such as the increased availability of robust intramodal and intermodal platform alternatives) . . . can fully remove these non-market-based advantages, the need for continuing regulation of these facilities is eliminated as well.").

If the Commission nevertheless harbors any specific concerns about the potential exercise of market power in the IP-enabled services market, the means to address these concerns is to develop and explore the "Net Freedom" principles recently articulated by Chairman Powell[135/] and the similar "Broadband Connectivity Principles" suggested by the High Tech Broadband Coalition.[136/] Properly implemented, these principles could ensure that consumers receive the benefits of an open and robustly competitive market for IP-enabled services, while remaining protected from any harms that might result from the unfair exercise of market power by a particular provider. This approach is far preferable to the agenda proposed by MCI, AT&T, and some others, who want the Commission to begin from the presumption that their ILEC competitors' IP-enabled networks and facilities should be heavily regulated, unless and until the Commission finds otherwise. This presumption of regulation is entirely contrary to the Congressional directive "to preserve the vibrant and competitive free market that presently exists" for Internet-based services.[137/] Thus, rather than rushing to regulate IP-enabled networks and facilities in the absence of any alleged market power abuses, the Commission should monitor the market carefully with the above-mentioned principles in mind and take appropriate action, if and when a need actually arises. In this manner, the Commission will be able to

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135/ *See generally* Remarks of Michael K. Powell, Chairman, Federal Communications Commission, "Preserving Internet Freedom: Guiding Principles for the Industry" (Feb. 8, 2004) ("Net Freedom Remarks").

136/ *See* High Tech Broadband Coalition Statement of Principles, "Broadband Principles for Consumer Connectivity" (Sept. 25, 2003), *available at* http://www.nam.org/s_nam/bin.asp?CID=200969&DID=227140&DOC=FILE.PDF.

137/ 47 U.S.C. § 230(b)(2).

balance the needs of consumers and providers while maintaining a generally unregulatory framework for IP-enabled services.[138/]

IV. THE COMMISSION SHOULD PROMPTLY RESOLVE DISAGREEMENTS RELATING TO THE INTERCARRIER COMPENSATION OBLIGATIONS THAT APPLY TO IP-ENABLED SERVICES.

A number of commenters agree that one of the most pressing concerns before the Commission is the need to expeditiously resolve disputes regarding the application of existing intercarrier compensation rules to IP-enabled services.[139/] As SBC noted in its opening comments, the marketplace for IP-enabled services has become distorted by confusion over these issues,[140/] and the extent of that confusion is underscored by the widely divergent views expressed by other commenters. Most commenters preface their arguments on this issue by emphasizing the importance of reforming intercarrier compensation generally, and SBC has been supportive of, and a participant in, ongoing industry efforts to reach a consensus for doing so. But in the interim, the Commission should confirm that its existing rules require the payment of access charges for IP-PSTN traffic. Further, the Commission should adopt SBC's proposal to prospectively apply exclusively interstate access charges to such traffic. This solution will allow the Commission to enforce current legal obligations in a workable manner that provides a reasonable transition to the adoption of a unified intercarrier compensation regime generally.

138/ *See, e.g.*, Net Freedom Remarks at 6 ("[I]f we secure a reasonable balance between the needs of network providers and internet freedom, consumers with reap the benefits of broadband *without intrusive regulation*, while preserving industry's incentives to deploy more high-speed broadband platforms.").

139/ *See, e.g.*, AT&T Comments at 16; Level 3 Comments at iv (proposing that the Commission resolve issues relating to intercarrier compensation in "Phase I" of this proceeding).

140/ *See* SBC Comments at 65-66.

A. The Commission Must Enforce Its Existing Access Charges Rules While It Works Toward Broader Intercarrier Compensation Reform.

A number of commenters that note the need for comprehensive solutions to intercarrier compensation problems also endorse the Commission's initial findings that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations" and that "the cost of the PSTN should be borne equitably among those that use it in similar ways."[141/] Consistent with these guiding principles, a wide range of commenters — including CLECs, cable companies, states, and ILECs — urge the Commission to clarify that its existing rules require providers of IP-enabled services to pay access charges when they use the PSTN to deliver calls to, or pick up calls from, third-parties with whom their own customers communicate (such as a called or calling party on the PSTN who is served by a LEC).[142/] As SBC and others explained

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141/ *IP-Enabled Services NPRM* ¶ 33; *see, e.g.*, Association for Local Telecommunications Services ("ALTS") Comments at 5; Illinois Commerce Commission Comments at 11; Texas AG Comments at 6-7; Sprint Comments at 26-27; BellSouth Comments at 43; Verizon Comments at 43; Comcast Comments at 8 n.14; NCTA Comments at 19; CenturyTel Comments at 12. Nonetheless, this is not the proceeding for consideration of claims by some cable companies that they are entitled to compensation for terminating calls to their VoIP customers on their cable networks. *See* NCTA Comments at 19 (stating that "all network providers should have the same compensation opportunities on an equitable and non-discriminatory basis"); Comcast Comments at 8 n.14 (asserting that if ILECs are compensated for calls that terminate on their networks, "then ILECs should have a corresponding duty to compensate facilities-based VoIP service providers for terminating calls on their networks"). Because cable providers are not currently entitled to collect compensation for calls that terminate on their broadband networks (as opposed to any circuit-switched networks that cable companies may operate), granting this request would require a change in the existing rules that is well beyond the scope of this proceeding. As the Commission has explained, "[t]he access charge system was designed for basic voice telephony provided over a circuit-switched network," First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16134 ¶ 347 (1997) ("*Access Charge Reform Order*"); it does not authorize a particular form of compensation for the use of broadband IP networks.

142/ *See, e.g.*, Time Warner Telecom Comments at 42; Texas AG Comments at 4; CenturyTel Comments at 14 ("All interexchange traffic is subject to interstate access charges unless and until the Commission replaces access with a new mechanism designed to compensate LECs for the use of their networks."); Sprint Comments at 26; National Exchange Carrier Association ("NECA") Comments at 9-13; BellSouth Comments at 43; Verizon Comments at 43; *see also*

in their opening comments, the baseline obligation to pay access charges generally extends to all "users of access service," which encompasses a range of entities that has always included information service providers such as providers of IP-enabled services.[143/] If the Commission were to eliminate this long-standing obligation pending the adoption of broader changes to intercarrier compensation, it would merely create (or prolong) opportunities for regulatory arbitrage while threatening the viability of the PSTN.[144/] Furthermore, contrary to the claims of some commenters that applying access charges in this context somehow results in the Commission "picking winners and losers,"[145/] this result is competitively neutral, as it ensures that all users of access services are required to pay the appropriate rate for the services they obtain without arbitrarily preferring one type of technology over another.

Predictably, some commenters invoke the "ESP exemption" and incorrectly claim that it insulates all information service providers, including IP-enabled services providers, from ever having to pay access charges, even on the PSTN side of an IP-PSTN call.[146/] According to these commenters, subjecting providers of IP-enabled services to the baseline access charge obligation would entail either a retraction of the ESP exemption or "an extension" of the existing rules.[147/]

Wisconsin PSC Comments at 8 (stating that providers of IP-enabled services should be required to pay "[a]ppropriate compensation for use of the PSTN").

143/ *See* SBC Comments at 68-69 (citing Memorandum Opinion and Order, *Petitions for Reconsideration of MTS and WATS Market Structure*, 97 F.C.C.2d 682, 711-12 ¶ 78 (1983) ("*MTS/WATS Market Structure Order*")).

144/ *See, e.g.*, CenturyTel Comments at 15; Sprint Comments at 26.

145/ AT&T Comments at 24.

146/ *See, e.g.*, AT&T Comments at 27; Level 3 Comments at 4 n.5.

147/ *See, e.g.*, AT&T Comments at 27; MCI Comments at 45; Information Technology Association of America ("ITAA") Comments at 25-26; FERUP Comments at 18.

But as SBC and others explained in their opening comments, information service providers are *not* exempt from the baseline access charge obligation when they use the PSTN for purposes other than to provide information services to their own subscribers.[148/] This conclusion is supported by the history of the ESP exemption, its focus, and the manner in which it has been described.[149/] For example, when the Commission first adopted the ESP exemption, it focused exclusively on the information service provider's use of the local exchange network to have calls delivered between its subscribers and *its* "location in the exchange area."[150/] Indeed, as SBC has already noted, this is the only use of the PSTN that the Commission could have had in mind when it first created the access charge regime (and the ESP exemption) in 1983, since the information services that prevailed at that time did not entail the delivery of traffic to or from non-subscribers on the PSTN.[151/] Rather, subscribers reached their information service provider over the PSTN using the LEC's access service, and then the information service provider "terminated" the call to a database or computer using an interstate connection (usually provided over an IXC's interstate facilities), avoiding any LEC's facilities altogether on the terminating end of the call. And in any event, the call certainly did not continue on or return to a different point on the PSTN again *after* hitting the information service provider's distant computer or database site.[152/]

148/ *See* SBC Comments at 70-71; *see also, e.g.*, BellSouth Comments at 44; Verizon Comments at 45-47.

149/ *See* SBC Comments at 70-71.

150/ *MTS/WATS Market Structure Order* at 711-12 ¶ 78.

151/ *See* SBC Comments at 70 n.160.

152/ *See, e.g.*, Memorandum Opinion and Order, *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5987 ¶ 2 (1987), *vacated as moot*, Memorandum Opinion and Order, *Northwestern Bell Telephone Company Petition for Declaratory Ruling and WATS Related and Other Amendments of Part 69 of the Commission's*

In fact, just over a month before filing its comments in this proceeding, AT&T forthrightly admitted that "the Commission has squarely rejected the claim that 'enhanced services providers' are categorically exempt from interstate access charges[.]"[153/] Not surprisingly, AT&T now attempts to distance itself from that admission by claiming that the narrower (and correct) reading of the ESP exemption as explained in detail by SBC and others "rests almost entirely on a stray comment" from a single Commission order.[154/] But it is AT&T and other opponents of access charges that rely on select quotes from a few Commission orders without any context, to the limited extent that they cite any authority at all.[155/] For example, AT&T states that "the scope of the ESP exemption" is described in the following statement from the Commission's 1997 *Access Charge Reform Order*: "'In [1983], the Commission decided that, although [ISPs] may use incumbent LEC facilities to originate and terminate interstate calls, ISPs should not be required to pay interstate access charges.'"[156/] But the "use [of] incumbent LEC facilities" referred to in this passage is limited to that described two paragraphs later in the

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Rules, 7 FCC Rcd 5644, 5644 ¶ 1 (1992); Notice of Proposed Rulemaking, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 2 FCC Rcd 4305, 4306 ¶ 9 n.27 (1987) (stating that many enhanced services "are provided pursuant to a network configuration in which a call originates over an 'open' end and terminates over a 'closed' end"); Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 3 FCC Rcd 4543, 4548 ¶ 39 n.87 (1988) (noting that enhanced service providers "have substantial one-open-end usage").

153/ Letter from D. Lawson, Counsel for AT&T, to M. Dortch, Secretary, FCC, *AT&T's Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, CC Docket No. 02-361, at 3 (Apr. 13, 2004) (emphasis added).

154/ AT&T Comments at 27.

155/ Indeed, many commenters simply offer conclusory statements that the ESP exemption applies in this context, without any support whatsoever. *See, e.g.*, Qwest Comments at 41-42 (asking the Commission to confirm that, pending intercarrier compensation reform, IP-enabled services providers are covered by "the 'ESP exemption' . . . and are not subject to access charges").

156/ AT&T Comments at 27-28 (quoting *Access Charge Reform Order* at 16131-32 ¶ 341).

same *Order*: the use of those facilities "to receive calls from [ISPs'] customers."[157/] The use of ILEC facilities for purposes of conventional telephony, such as completing calls initiated by customers of IP-enabled services, does *not* fall within the limited scope of the ESP exemption.

Perhaps realizing the weaknesses in their attempted manipulation of the ESP exemption, some commenters urge the Commission simply to abandon the existing law entirely and carve out new piecemeal exceptions to the current compensation rules for IP-enabled services.[158/] According to this view, providers of such services should be immediately relieved from any obligation ever to pay access charges, regardless of what the law currently requires.[159/] As an initial matter, it would be completely irrational to alter existing legal obligations in advance of more comprehensive changes, particularly given that those modifications would be admittedly temporary and would produce competitive asymmetries that favor certain providers. Rather, the Commission should focus on developing methods of enforcing the existing law and thereby preserve prevailing expectations until it reforms intercarrier compensation generally. Otherwise, it would risk creating even more confusion and instability.

In any event, the various justifications cited by these commenters for changing rather than enforcing the existing rules are misconceived. A number of commenters assert that the access charge system has "outlived its usefulness" and "serves only as an anticompetitive source of monopoly profits and price squeezes,"[160/] and that there is thus "no conceivable public

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157/ *Access Charge Reform Order* at 16132-33 ¶ 343.

158/ *See, e.g.*, AT&T Comments at 22.

159/ *See id.* at 23 ("[T]he Commission should, in this proceeding, affirmatively exempt *all* VoIP service from access charges, whether or not they might otherwise be subject to access charges under current rules."); MCI Comments at 45.

160/ AT&T Comments at 22.

interest" for requiring the payment of access charges in this context.[161/] These claims are just plain wrong: access charge revenues continue to play an important role in ensuring affordable phone service. Indeed, less than three months ago, the Commission rejected similar arguments when it denied a petition in which AT&T sought to be excused from paying access charges on its "IP-in-the-middle" long distance service.[162/] The Commission pointed out that it is considering comprehensive intercarrier compensation reform in its *Intercarrier NPRM* and that any issues related to access rate levels or rate structures should be addressed in that proceeding based on the detailed record developed there.[163/] As many commenters note and as the Commission appears to recognize, exempting certain types of traffic from access charges in the piecemeal fashion suggested by AT&T and others would be affirmatively harmful.[164/]

Many commenters engage in extensive hand-wringing at the potential consequences of confirming that IP-enabled services are subject to access charges, offering conclusory and hyperbolic assertions that applying the law as it stands will "deal a crippling blow to the development of these services."[165/] Such claims, which invoke the policy concerns that prompted the Commission to create the ESP exemption over twenty years ago, are unavailing here. Unlike the enhanced service providers that were the Commission's focus when it first devised the ESP exemption, the entities providing IP-enabled services today are often large and

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[161/] AT&T Comments at 23.

[162/] Order, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 ¶ 18 (2004) ("*AT&T Access Charge Order*").

[163/] *AT&T Access Charge Order* ¶ 18.

[164/] *See, e.g.*, CenturyTel Comments at 15; Texas AG Comments at 3-4; NECA Comments at 9.

[165/] *See, e.g.*, AT&T Comments at 23.

sophisticated businesses that hardly need an industrial policy that gives them artificial regulatory advantages over similarly situated providers. Indeed, as the comments filed thus far reveal, the providers of today's IP-enabled services include major cable operators and other well-established companies. Moreover, interstate access charges are far below what they were when the Commission originally saw the need to create the ESP exemption.[166/] Commission data show that the interstate access charge per "conversation minute" has decreased from approximately 17 cents in 1984 — the year after the Commission introduced the ESP exemption — to approximately 1.5 cents in 2003.[167/] This drastic reduction in access rates over time underscores the lack of any need for the ESP exemption in today's market.

B. The Exclusive Application of Interstate Access Charges to IP-Enabled Services Resolves the Concerns Cited By Some Commenters As Reasons Not to Enforce the Commission's Existing Rules.

In its opening comments, SBC explained that because IP-enabled services are indivisibly interstate, it is appropriate to treat them as such for purposes of determining the type of access charges applicable on the PSTN side of an IP communication. That approach for implementing existing intercarrier compensation obligations directly resolves many of the concerns cited by commenters as reasons not to apply access charges at all in this context, while still permitting the Commission to achieve its objective of ensuring that "the cost of the PSTN is borne equitably among those that use it in similar ways."[168/] As explained in SBC's opening comments, this proposal will allow a reasonable transition to a comprehensive, uniform intercarrier compensation regime, because it will prescribe, for an interim period, roughly the same level of

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166/ *See* SBC Comments at 80.

167/ Industry Analysis and Technology Division, Wireline Competition Bureau, "Trends in Telephone Service," Table 1.1 at 1-6 (May 2004).

168/ *IP-Enabled Services NPRM* ¶ 33.

compensation on the PSTN side of a call that would be due for circuit-switched calls. In addition, while several commenters claim that access charges cannot be assessed on IP-PSTN calls due to an inability to identify the geographic endpoints of such traffic,[169/] SBC's proposal eliminates any need to develop this capability, since it applies the same rate to all traffic. Finally, applying interstate (and not intrastate) access charges prospectively mitigates the concerns expressed by many commenters concerning above-cost charges, since interstate access rates have been reformed over time to more closely reflect cost.[170/]

Several commenters agree that the exclusive application of interstate access charges presents a straightforward, practical method of implementing existing intercarrier compensation obligations. For example, Time Warner Telecom observes that it offers "the most promising" interim option for bringing stability to intercarrier compensation in this context pending more general intercarrier compensation reform.[171/] And NECA suggests that all VoIP traffic should be treated as interstate on a default basis for purposes of intercarrier compensation, given the infeasibility of separating its interstate and intrastate components.[172/] Such comments are consistent with Commission precedent stating that facilities used for the provision of jurisdictionally interstate services — such as IP-enabled services[173/] — are properly subject to federal rules.[174/] This view is also consistent with the need to address the substantial difficulty in

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169/ *See, e.g.*, AT&T Comments at 24.

170/ *See* SBC Comments at 80.

171/ Time Warner Telecom Comments at 42.

172/ *See* NECA Comments at 9-13.

173/ *See supra* Section I.A.

174/ SBC Comments at 77-78 (citing cases).

applying different compensation rules to IP-enabled services, given their inherently interstate nature.[175/]

The alternative uniform approach to intercarrier compensation proposed by Level 3 — the application of reciprocal compensation to all IP-PSTN traffic — is fundamentally flawed. First, Level 3's assertion that reciprocal compensation is the default rule for all traffic is incorrect. While section 251 of the 1996 Act may give the Commission authority to establish reciprocal compensation for all traffic, section 251(g) expressly *preserves* the preexisting access charge regime until or unless changed by the Commission.[176/] As discussed above, the Commission cannot alter that regime in piece parts without creating competitive inequities and market distortions in the interim.

Level 3's approach would create precisely such industry dislocations by presuming, in effect, that all traffic on the terminating PSTN end of an IP communication is "local" and is subject to low reciprocal compensation charges, even though the majority of commenters — including Level 3 — correctly observe that IP-enabled services are, in fact, *interstate* services.[177/] SBC's approach, by contrast, would preserve the industry status quo, pending a unified regime

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175/ *Id.* at 78. In the event the Commission decides not to exclusively apply interstate access charges to IP-PSTN calls (or otherwise chooses not to resolve the issue of intercarrier compensation for IP-enabled services in a timely manner), the Commission should, at a minimum, expeditiously affirm that local telephone companies should continue to charge "jurisdictionalized" compensation rates for IP-PSTN traffic (notwithstanding its interstate nature) in accordance with their existing tariffs — at least until the Commission completes its intercarrier compensation proceeding. *See id.* at 81.

176/ *See ISP Remand Order* at 9169-70 ¶ 39; 47 U.S.C. § 251(g) (providing that local exchange carriers shall provide exchange access and exchange services for such access "in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (*including receipt of compensation*) that appl[ied] to such carrier" before the passage of the 1996 Act) (emphasis added).

177/ *See* SBC Comments at 77-78.

for intercarrier compensation generally, by specifying a compensation regime — interstate access charges — that falls in between reciprocal compensation rates and intrastate access charges and could serve as a rough proxy for what PSTN carriers would have received in the absence of VoIP traffic. Indeed, as SBC has explained, this approach may undercompensate those carriers, because today's VoIP services may often be used disproportionately as a replacement for toll calls rather than non-toll local calls.[178/]

Level 3 also argues that applying access charges will force changes in network infrastructure, because providers will have to route all traffic to access trunks (since it is generally not possible to charge access when traffic comes over local lines and PRIs).[179/] The fact that some VoIP providers may, in certain circumstances, need to change the products they purchase to deliver IP-PSTN traffic to the PSTN is simply a consequence of those providers' unlawful efforts to avoid their access charge obligations under existing Commission rules. It should not now preclude the correct application of those rules and the appropriate intercarrier compensation policy result. The Commission already has flatly rejected the argument that difficulty in complying with applicable rules excuses noncompliance. In *AT&T Corp. v. Bell-Atlantic-Pennsylvania*, AT&T (among other IXCs) contended that carriers that were overbilling could not defend themselves by pointing to their inability to identify and measure the relevant traffic, arguing that the carriers' "deliberate choices to disable themselves from properly

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178/ *See id.* at 79 (citing VoIP Fact Report at 16, 18); *see also* VoIP Fact Report at 9-10 & C-1 (describing specific VoIP services that offer unlimited free calling); AT&T Comments at 1 ("Current VoIP offerings allow customers that have a broadband connection to place unlimited calls anywhere in the country for a single low price.").

179/ *See* Level 3 Comments at 5-6.

measuring [the traffic at issue] is no defense."[180/] The Commission agreed that obstacles to compliance with its rules do not relieve companies of liability for noncompliance.[181/] The Commission should likewise conclude that providers of IP-enabled services must comply with existing law and pay access charges for their use of the PSTN to pick up or drop off calls for their customers. SBC's proposal that interstate access charges be used as the prevailing rate is fully consistent with the Act and provides a workable method for doing so. To the extent additional implementation problems arise, carriers can work together and, if necessary, with the Commission to develop additional means for ensuring enforcement of the existing rules.[182/]

V. THE COMMISSION SHOULD ADOPT NUMBERING POLICIES THAT PUT IP-ENABLED SERVICES PROVIDERS ON THE SAME COMPETITIVE FOOTING AS TELECOMMUNICATIONS CARRIERS.

As SBC explained in its opening comments, the Commission should amend its rules to permit VoIP providers to obtain direct access to NANP numbers. The existing rules permit only state-certified carriers to acquire numbers directly from the North American Numbering Plan Administrator ("NANPA") and/or Pooling Administrator ("PA").[183/] Since VoIP providers are information service providers and state certification therefore is typically neither viable nor

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[180/] Memorandum Opinion and Order, *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, 596 ¶ 92 (1998) (internal quotation and citation omitted).

[181/] *See id.* at 596-97 ¶ 93.

[182/] In addition, the Commission should encourage and facilitate any lawful, market-driven responses that carriers may develop to meet the needs of VoIP providers who wish to interconnect with the PSTN.

[183/] *See generally* SBC Comments at 82-94; 47 C.F.R. § 52.15(g)(2)(i) (providing that numbering applicants must be "authorized to provide service in the area for which the numbering resources are being requested"); Report and Order and Further Notice of Proposed Rulemaking, *Numbering Resource Optimization*, 15 FCC Rcd 7574, 7615 ¶ 97 (2000) (*"First Numbering Order"*) (interpreting section 52.15(g)(2)(i) of the Commission's rules as requiring "carriers [to] provide, as part of their applications for initial numbering resources, evidence (*e.g.*, state commission order or state certificate to operate as a carrier) demonstrating that they are licensed and/or certified to provide service in the area in which they seek numbering resource[s].").

appropriate, the practical effect of the Commission's rules is to prevent VoIP providers from acquiring numbers directly. VoIP providers' inability to acquire numbers directly, in turn, imposes unnecessary and inefficient constraints on their choice of network architecture.

By affirmatively establishing VoIP providers' right to obtain numbers directly from the NANPA and/or PA, the Commission can eliminate these inefficiencies and promote innovation by and competition among VoIP providers. And, as SBC and several other commenters agree, the Commission can serve its numbering policies and guard against number wastage concerns by ensuring that VoIP providers have basic numbering obligations along with the right to direct access to NANP numbers.[184/] This approach is entirely consistent with the Commission's obligation under section 251(e) of the Act to "make [NANP] numbers available on an equitable basis" and with the Commission's procompetitive, nondiscriminatory philosophy of avoiding numbering policies that, like those at issue here, "unduly favor or disadvantage any particular industry segment or group of consumers" or "unduly favor one technology over another."[185/]

One commenter suggests that the Commission should also require VoIP providers to furnish directory publishers with Subscriber Line Information ("SLI"). To the extent VoIP customers wish to have their numbers listed in directories and directory publishers actually have difficulty obtaining SLI from VoIP providers (and it is not clear that they will), the Commission should consider establishing a requirement that VoIP providers who make SLI available must do so in a nondiscriminatory fashion. In addition, the Commission should reject the call for technology-specific area codes for VoIP, just as it did in the wireless context.

[184/] *Id.*; NCTA Comments at 21; Comcast Comments Appendix A at 2; Cisco Comments at 10; Sprint Comments at 20.

[185/] Public Notice, *FCC Establishes North American Numbering Council Advisory Committee*, 11 FCC Rcd 22367, 22368 (1996).

Finally, allowing VoIP providers to utilize numbers should not create any unique numbering exhaust problems in most circumstances and may even reduce the pace of net number consumption. Nonetheless, to guard against any potential number exhaust problems that could arise, the Commission should explore number exhaust issues through its *Numbering Resource* docket, the forum best suited to considering this question in a comprehensive fashion.[186/]

A. The Commission Should Authorize Direct Assignment of NANP Numbers to IP-Enabled Services Providers.

As SBC showed in its opening comments, and as Sprint likewise notes, the current numbering arrangement, in which certificated carriers provide numbers to VoIP providers, is "artificial," "economically inefficient," and cannot be directly overseen by the Commission.[187/] As SBC explained, limiting VoIP providers to indirect number access can produce inefficient network architectures.[188/] The Commission's longstanding philosophy has been that numbers

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186/ Order, *Administration of the North American Numbering Plan*, CC Docket No. 99-200, DA 04-1721 (rel. June 17, 2004).

187/ Sprint Comments at 20; *see generally* SBC Comments at 84-89.

188/ Indeed, the Commission recently granted SBC IP Communications, Inc. ("SBC-IP") Special Temporary Authority ("STA") to acquire a limited quantity of NANP numbers in order "to experiment with a more efficient means of communication between IP networks and the PSTN." Order, *Administration of the North American Numbering Plan*, CC Docket No. 99-200, DA 04-1721, at 2 (rel. June 17, 2004). SBC-IP expects favorable results from that trial and, in all likelihood, will be prepared to deploy commercial VoIP services well before the Commission acts in the present proceeding. Accordingly, SBC-IP has also requested a limited waiver of the Commission's rule that only state certificated carriers may acquire NANP numbers directly, to be effective until the Commission adopts final numbering rules regarding IP-enabled services in this proceeding. *In re SBC IP Communications, Inc. Petition for Limited Waiver of Section 52.15(g)(2)(i) of the Commission's Rules Regarding Access to Numbering Resources*, Petition for Limited Waiver (filed July 7, 2004) ("*Waiver Petition*"). Granting SBC-IP's requested waiver — like granting the STA — will not prejudge the outcome of the present proceeding, *see id.* at 10-11; by the same token, however, it is no substitute for remedying the inefficient and unnecessary constraints that the current rules impose on VoIP providers generally.

should be accessible to all *bona fide* service providers in a competitively neutral manner.[189/] Yet the current arrangement discourages even VoIP providers that are ready and willing to provide service immediately from obtaining direct access to numbers, because, even though they are information service providers, Commission rules force them to submit to state common carrier regulation as a prerequisite for obtaining numbering resources.

Most commenters that address the issue of numbering resources are in full agreement that VoIP providers should be able to acquire NANP numbers directly. NCTA and Comcast, for example, argue that VoIP providers should have the "right to obtain telephone numbers, including numbers secured through number portability, [and] to assign those numbers to VoIP customers."[190/] Cisco and Sprint similarly endorse the principle that VoIP providers should have "full access to [NANP] numbers"[191/] and "should enjoy the same [numbering resource] rights accorded other providers using different technologies."[192/]

BellSouth expresses concern, however, that direct use of numbers by VoIP providers could accelerate telephone number exhaust.[193/] BellSouth accordingly proposes that the

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189/ *First Numbering Order* at 7615 ¶ 99 (Commission "d[id] not intend to circumscribe any carrier's ability to obtain initial numbering resources in order to initiate service[;]" its rule requiring state certification was designed only "to prevent actual or potential abuses of the number allocation process;" and it, "[i]n fact, . . . expect[ed] the establishment of these requirements to make more numbering resources available to carriers lawfully authorized by state commissions to provide local service by preventing unauthorized carriers from unlawfully depleting numbering resources."); 47 C.F.R. § 52.9(a) (numbering protocols must "[n]ot unduly favor or disfavor any particular telecommunications industry segment or group of telecommunications customers; and . . . [n]ot unduly favor one telecommunications technology over another.").

190/ NCTA Comments at 21; Comcast Comments Appendix A at 2.

191/ Cisco Comments at 10.

192/ Sprint Comments at 20.

193/ BellSouth Comments at 53-54.

Commission retain the status quo with respect to numbering access, pending an investigation by the North American Numbering Council ("NANC") or the Industry Numbering Council ("INC"),[194/] into the effect of direct acquisition of NANP numbers by VoIP providers on number exhaustion.[195/]

In general, numbering exhaust is a legitimate public policy concern, and the Commission is studying the question closely, as it should. But the Commission need not be concerned that granting VoIP providers direct access to numbers implicates any unique numbering exhaust concerns. Whether a VoIP provider utilizes numbers directly or indirectly would not change the total *quantity* of numbers used. In fact, direct access may decrease the chance of number wastage or exhaust, because it would allow the Commission to directly monitor VoIP providers' use of numbers. Moreover, as SBC explained in its opening comments, the fact that the current rules bar most VoIP providers from directly acquiring numbers appears to be entirely unintentional and came about because the Commission did not have VoIP in mind when it drafted the current rules.[196/] There accordingly is no need for additional study before amending the letter of the current rules to conform with their spirit. Additional delay in allowing VoIP providers to acquire NANP numbers directly will only continue to prevent those providers from fully realizing the potential of IP-enabled services, and stifle the growth of a nascent industry, without any compensating benefit. Exhaust concerns can be included in the Commission's

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194/ *See generally* 47 C.F.R. §§ 52.11, 52.12(c) (explaining advisory roles of NANC and INC).

195/ BellSouth Comments at 53. BellSouth is not, of course, suggesting that VoIP providers be prohibited from using numbers at all; to the contrary, BellSouth specifically notes that VoIP providers may, for now, "obtain NANP resources either by becoming certificated as a carrier, or by partnering with a certificated carrier." *Id.* at 54.

196/ SBC Comments at 87.

ongoing general examination of that issue, but should not delay crafting numbering rules that make sense for VoIP providers.

B. VoIP Providers Should Be Subject to Basic Numbering Obligations When They Use Numbers, But Should Not Be Subject to Special SLI Obligations or Be Required to Use a VoIP-Specific Area Code.

As SBC explained, VoIP providers should be subject to basic obligations when they use numbers, including number usage reporting, pooling, and cost support; VoIP providers also should be fully subject to number portability requirements.[197/] Other commenters, such as Comcast, the NCTA, and Cisco, agree that VoIP providers should have roughly the same "critical rights . . . [and] critical responsibilities" regarding numbering as ordinary telecommunications carriers.[198/] The Commission has ample authority to impose these requirements as a condition of allowing VoIP providers to use numbers given its overarching authority over numbering and because the use of numbers by VoIP providers will affect the availability and use of numbers by all communications providers.[199/]

A few commenters suggest that the Commission adopt specific, restrictive rules in connection with VoIP providers' use of numbers. For example, the Yellow Pages Integrated Media Association ("YPIMA") urges the Commission to promulgate a rule requiring VoIP providers to provide SLI — the names and numbers of its customers — to companies that compile telephone directories.[200/] Such a rule is not necessary. SBC believes that most VoIP customers who use telephone numbers will want their numbers to be included in directories and

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197/ *Id.* at 89-94.

198/ Comcast Comments at 7-11; NCTA Comments at 21; Cisco Comments at 10.

199/ 47 U.S.C. § 251(e)(1) (granting the Commission "exclusive jurisdiction" over numbering resources); *Southwestern Cable*, 392 U.S. at 178.

200/ Yellow Pages Integrated Media Association ("YPIMA") Comments at 1-4.

that the market will respond, with providers making the necessary commercial arrangements with directory publishers. However, to the extent the Commission finds it necessary to intervene in this area in the future, it could consider a requirement that, when VoIP providers make SLI available to directory publishers, they do so on a nondiscriminatory basis. But before the Commission takes any action, it should look to the VoIP market to determine if a problem truly exists.

Finally, BT America argues for the creation of non-geographic numbering ranges — a "VoIP area code" or something similar — in order to give customers certainty about who they are calling.[201/] However, the Commission has noted its "extreme[] reluctan[ce] to consider permanent technology-specific [area codes]"[202/] and has specifically recognized in the wireless context that technology-specific numbering ranges are inappropriate because they are competitively non-neutral.[203/] The same principles apply here. For example, a VoIP-specific area code would effectively eliminate inter-modal local number portability, since changing from a PSTN-based number to a VoIP-specific number (or vice versa) would necessarily require incoming callers to dial a different area code. Similarly, a single non-geographic VoIP-specific area code might reach number exhaust more quickly than the existing PSTN area code or codes in any given geographic region. Moreover, PSTN-based consumers might be quite confused about whether calls to or from VoIP-specific area code numbers would incur toll charges at the retail level, especially since current retail PSTN-based billing arrangements typically impose

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201/ BT America Comments at 5-6.

202/ Third Report and Order, *Numbering Resource Optimization*, 17 FCC Rcd 252, 285 ¶ 74 (2001) (*"Third Numbering Order"*).

203/ Declaratory Ruling and Order, *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, 10 FCC Rcd 4596, 4607-12 ¶¶ 25-29, 33-35 (1996).

such charges for calls to different area codes. This confusion could make consumers reluctant to dial VoIP-based numbers, which could in turn lead some consumers to avoid subscribing to VoIP services. For these reasons, the Commission should reject any policy that would entail VoIP-specific telephone numbers.

VI. EMERGENCY CALLING IS AN IMPORTANT PUBLIC POLICY THAT THE COMMISSION SHOULD ADDRESS FOR IP-ENABLED SERVICES.

The comments reflect considerable consensus on the appropriate Commission approach to 911/E-911 for IP-enabled services. In general, commenters across the board agree that providers of IP-enabled voice services that interconnect with the PSTN should provide 911 capabilities, and that the Commission has the authority to impose that requirement, regardless of how IP-enabled services are classified.[204/] At the same time, almost all of these commenters urge the Commission to allow the industry to develop its own standards and implement voluntary solutions before the Commission imposes any regulations or sets compliance timeframes.[205/] "In short, the Commission should require access to 911 and E-911 for IP-enabled voice services" that interconnect with the PSTN, "but it must recognize that a transition [to establish and

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[204/] *See* BellSouth Comments at 49-50 ("The Commission can and should require [certain] IP-enabled service providers . . . to fulfill 911 emergency call processing requirements . . . ."); FERUP Comments at 14 ("The provision of functionally equivalent E911 service should not be left solely to the market to address."); Verizon Comments at 51 ("The Commission should require all providers of VoIP services to have the capability of allowing their subscribers to reach emergency personnel by dialing 911."); AT&T Comments at 32 (same); Comcast Comments Appendix A at 4 (same).

[205/] *See* AT&T Comments at 32-33 ("[T]he Commission should acknowledge that industry coalitions are working diligently to find an industrywide solution . . . ."); Vonage Comments at 38 ("[T]he Commission should allow the VoIP industry the opportunity to develop industry standards to effectuate 911/E911 service."); Verizon Comments at 51 ("[T]he Commission should refrain from requiring VoIP providers immediately to provide access to enhanced 911 ('E911') services until the industry has had an opportunity to develop standards and solutions for VoIP E911 functionality."); BellSouth Comments at 50 (same); FERUP Comments at 14 (same).

implement standards] will be necessary."[206] As the Commission itself has recognized, "development and deployment of [IP-enabled] services is in its early stages, [] these services *are* fast-changing and likely to evolve in ways that we cannot anticipate, and [] imposition of regulatory mandates, particularly those that impose technical mandates, should be undertaken with caution."[207] By spearheading industry efforts to develop nationwide standards and solutions, and refraining from imposing 911 service obligations on IP-enabled services providers prior to the development of those standards, the Commission will strike the appropriate balance between "the potential public benefits of requiring emergency calling and other public safety capabilities" and "the risk that regulation could slow technical and market development . . . ."[208]

A. The Commission Should Address IP-Enabled 911 Services Only for Those IP-Enabled Services Offering Voice Capability and Interconnecting With the PSTN.

As SBC made clear in SBC's opening comments, it is important as a preliminary matter to establish which types of IP-enabled services should be subject to 911 requirements. Sections 151 and 251(e)(3),[209] combined with the Commission's general authority to make rules and regulations as necessary to fulfill its duties under the Act, empower the Commission "to determine whether the public interest require[s] that a provider of a particular service should be required to provide 911/E911 to its customers . . . ."[210] And as the Commission already has

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206/ Avaya Comments at 22.

207/ *IP-Enabled Services NPRM* ¶ 53 (emphasis added).

208/ *Id.*

209/ 47 U.S.C. § 151 (giving the Commission the general authority to make communications available on a national basis "for the purpose of promoting safety of life and property through the use of wire and radio communication"); *id.* § 154(i) (authorizing and requiring the Commission to make rules and regulations as necessary to fulfill its duties under the Act).

210/ *IP-Enabled Services NPRM* ¶ 53 n.162 (citing *E911 Scope Order* at 25345-46 ¶¶ 13-15).

recognized in a different context, there may be no compelling public interest in requiring 911 capabilities from all services or in all circumstances.[211/] SBC and many other commenters noted that 911 obligations are appropriate only for those IP-enabled services that interconnect with the PSTN and offer voice capabilities.[212/] This is so both because subscribers are most likely to expect 911 capabilities from such services, and because the Commission's ancillary jurisdiction is at its apex with respect to services such as these that end users will utilize in place of or at least in conjunction with traditional telecommunications services.[213/]

Nonetheless, a few commenters that advocate the applicability of 911 obligations to all IP-enabled voice services appear to overlook the important distinction between voice services that interconnect with the PSTN and those that function only within a closed network,[214/] and one

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211/ *See* Report and Order and Further Notice of Proposed Rulemaking, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 11 FCC Rcd 18676, 18716-18 ¶¶ 81-83 (1996) (declining to impose 911 obligations on certain specialized mobile radio providers and mobile satellite system providers).

212/ *See* MCI Comments at 36 (stating that IP-enabled services that, inter alia, "are interconnected with the public switched telephone network . . . properly are subject to the Commission's ancillary jurisdiction"); Level 3 Comments at 36 ("[T]he Commission should require emergency service access for communications services that . . . offer real-time, two-way voice service that is interconnected to the PSTN . . . ."); BellSouth Comments at 49 ("An IP-enabled information service that . . . includes a voice capability component and . . . originates or terminates or both originates and terminates calls on the PSTN . . . should comply with E911 requirements . . . ."); Comcast Comments Appendix A at 3-4 ("A VoIP service provider . . . [that, inter alia,] receives calls from — and terminates them to — the PSTN . . . [should have] the obligation to provide consumers access to 911/E911 capabilities."); Time Warner Inc. Comments at 13 (stating that VoIP services that, inter alia, "offer[] 'real-time, two-way switched voice service' interconnected with the PSTN" should be "subject to 911 requirements").

213/ *See* SBC Comments at 98.

214/ *See* AT&T Comments at 29 (noting that "public safety capabilities are an important and beneficial part of the communications system, and IP-enabled voice services ultimately should include them"); United States Telecom Association ("USTA") Comments at 39 ("All providers of voice communications must comply with 911/E911 capabilities."); AARP Comments at 2 ("AARP strongly urges the FCC to ensure that VoIP service packages include enhanced 911

commenter goes so far as to suggest that "if a device or service could be used for communication of emergencies, it should be required" to do so.[215/] But as the Commission previously has found in a different context, the distinction between services interconnected with the PSTN and those that are not is significant, and 911 obligations should not apply to the latter.[216/] Such "closed" services do not, and are not designed to, meet all of a typical subscriber's communications needs. Accordingly, subscribers who opt for such services recognize that they are "off" the country's primary, interconnected communications network. Subscribers' expectations with respect to such "closed" and defined services would be very different from those of an end user on the PSTN or a subscriber to a VoIP service connected with the PSTN, both of whom expect to be able to communicate with anyone else on the PSTN, for any reason. As the Commission has explicitly recognized, such expectations are a critical factor in determining whether 911 obligations should apply.[217/] The public policy issues — if any — associated with such "closed" services, and the Commission's interest in regulating them (and its authority to do so), generally would be extremely limited.

On the other hand, the Commission also should reject suggestions by some commenters to further narrow the category of IP-enabled services that should provide 911 services by larding down the bright-line test SBC proposes with additional criteria. Some commenters, for example,

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(E911) services."). Verizon also makes reference to applying 911 obligations to "all VoIP providers." Verizon Comments at 51.

215/ National Emergency Number Association ("NENA") Comments at 5.

216/ *See E911 Scope Order* at 25347 ¶ 18 (discussing appropriate criteria for determining whether services should be subject to E-911 obligations, including whether the service "offers real-time, two-way voice service that is *interconnected to the public switched network*") (emphasis added).

217/ *See id.* (discussing appropriate criteria for determining whether services should be subject to E-911 obligations, including whether customers "have a reasonable expectation of access to 911 or E911 services").

suggest that 911 obligations should attach only to those IP-enabled services that "hold themselves out as substitutes for POTS,"[218/] those that use NANP numbers,[219/] those from which consumers expect 911 service,[220/] or those that "compet[e] with traditional . . . telephone services."[221/] These criteria unnecessarily narrow the scope of covered services. As noted, IP-enabled services that interconnect with the PSTN and offer voice capability are part of the primary communications infrastructure and, accordingly, are those from which consumers would expect and should receive 911 services.[222/] Further, tests that rely on subjective criteria, such as substitutability, would not only be difficult for the Commission to implement, but would create uncertainty for providers and consumers concerning the applicability of any 911 obligations.

B. The Commission Need Not and Should Not Exercise Its Authority to Require IP-Enabled 911 at This Time But Instead Should Lead Industry Efforts to Create Nationwide Standards.

While the Commission has clear authority to require providers of IP-enabled services that interconnect with the PSTN and provide voice capabilities to offer 911 services, that is a separate matter from whether the Commission should, at this time, impose such obligations. As SBC explained and most other commenters similarly state, the Commission instead should support the

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218/ *See* MCI Comments at 36 (suggesting additional criteria of "IP-based voice services that hold themselves out as substitutes for POTS services, [and] that assign NANP numbers to their customers").

219/ *See* BellSouth Comments at 49 (suggesting additional criterion of NANP telephone number); *See* MCI Comments at 36 (same).

220/ *See* Time Warner Inc. Comments at 13 (suggesting additional criterion of customers' expectations); Level 3 Comments at 36 (same).

221/ Level 3 Comments at 36 (suggesting additional criterion of competition with traditional telephone services); *see also* BellSouth Comments at 49 (suggesting additional criterion of substitutability for traditional voice communications); Time Warner Inc. Comments at 13 (suggesting additional criterion of competition with traditional CMRS or wireline local exchange service).

222/ *See* SBC Comments at 98.

ongoing voluntary industry efforts to develop 911 solutions and standards.[223/] As SBC stated in its opening comments, and as other commenters widely recognize, the VoIP industry is working diligently with organizations such as Alliance for Telecommunication Solutions ("ATIS"), the Emergency Services Interconnection Forum ("ESIF"), and the National Emergency Number Association ("NENA") to ensure the development of national standards.[224/] These voluntary efforts promise to produce a response that reflects the best thinking across the industry and that has buy-in from all players. As Vonage states, "Allowing the VoIP industry additional time to develop emergency access standards will eventually lead to a robust VoIP 911/E-911 system that will likely contain additional features" beyond those available from legacy voice services.[225/]

Furthermore, immediate implementation of 911 regulations for IP-enabled services is unnecessary. To the extent technically feasible today, many VoIP providers already offer 911 services for IP-enabled voice services that interconnect with the PSTN.[226/] While such services are not identical to PSTN-based 911, providers are actively seeking to meet their customers' emergency services needs. Further, it is not possible to craft sensible rules today, without taking the relevant but dynamic technological constraints and opportunities into account. It would, for example, make no sense to reflexively impose the 911 rules for legacy PSTN services on IP-

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223/ *See* AT&T Comments at 31-32 ("To realize these benefits, however, the entire industry — service providers, manufacturers, and PSAPs — must work together to overcome a number of substantial obstacles."); BellSouth Comments at 49-50 (encouraging the Commission to allow voluntary efforts to continue); Verizon Comments at 53-54 ("[I]t is apparent that voluntary industry consensus, rather than Commission regulation, will best facilitate deployment of IP-enabled E911 services.").

224/ *See* SBC Comments at 37; *see also* MCI Comments at 37 (discussing voluntary, cooperative efforts to fashion VoIP 911 standards and solutions); AT&T Comments at 30-31 (same); BellSouth Comments at 50 (same); Verizon Comments at 53 (same).

225/ Vonage Comments at 43.

226/ *See* SBC Comments at 99-100 n.236 (citing VoIP Fact Report at 17).

enabled services. As several commenters note, E-911 service is not technically feasible for non-registered VoIP (*i.e.*, mobile or "nomadic" VoIP that is used by the subscriber at a location other than his or her primary location).[227/] This is because the same flexibility that allows a VoIP user to access his VoIP service from any broadband connection undercuts his VoIP provider's ability to offer E-911 service. Unless the customer informs his VoIP provider of his location in advance (as is done with registered VoIP use), the VoIP provider cannot route the emergency call to the appropriate PSAP or forward the caller's physical location. As Vonage cautions, "[T]he Commission should not seek to impose standards on VoIP that the industry is currently unable to meet."[228/] And it would not make sense for the Commission to impose standards today, even if they were modified to capture the existing capabilities of IP-enabled services; this is a rapidly evolving industry, and, as MCI explains, "premature regulation may undermine innovation in the provision of emergency services."[229/]

This is not to say the Commission should sit back and do nothing. To the contrary, Commission participation and leadership in the industry's standard-setting efforts is essential to their success.[230/] As Avaya notes in its comments, "[t]here must be sustained coordination between this Commission, manufacturers, service providers, and . . . PSAPs."[231/] Addressing

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227/ *See* AT&T Comments at 31-32; MCI Comments at 37; BellSouth Comments at 51-52; Verizon Comments at 51-52; Vonage Comments at 39-40; USTA Comments at 40-41; Avaya Comments at 21 ("Enhanced 911 capabilities are generally not feasible in IP-enabled networks today when the end-user is taking advantage of the nomadic capabilities of IP-enabled phones."). *But see* Level 3 Comments at 36 ("it is technically possible for service providers [to adapt their services to provide 911 and E-911] . . . today").

228/ Vonage Comments at 43.

229/ MCI Comments at 38.

230/ *See* AT&T Comments at 33.

231/ Avaya Comments at 17-18.

technology and standardization issues among so many stakeholders and across jurisdictional divisions among federal, state, and local governments requires strong, national leadership from the Commission. As AT&T states, Commission oversight will "ensure that a cohesive, standardized process can be implemented on a nation-wide basis."[232/]

Ultimately, the Commission should adopt only minimum standards that are technologically feasible and necessary to ensure E-911 service for widespread IP-enabled services, without foreclosing future developments.[233/] By initially creating only baseline standards where needed, the Commission not only will help IP-enabled 911 service realize its full potential, but also will avoid stunting the technological innovations currently taking place. As SBC noted in its opening comments, any standards fashioned for IP-enabled services must leave room for continued technological development and innovation, and should not cramp such development in order to fit within the framework of a technologically outdated or limited system.[234/] Even once standards have been developed, "a period of transition will be necessary before these capabilities can become a reality."[235/]

Commenters raise a few other 911 regulatory issues that merit discussion. First, several commenters suggest that the industry and the Commission cannot establish meaningful 911

232/ AT&T Comments at 33. As SBC explained in its opening comments, by working now to establish national standards, the Commission will help prevent the disruption and costs associated with retrofitting solutions after ad hoc standards are allowed to proliferate. *See* SBC Comments at 98; Avaya Comments at 18 (without a "single set of nationwide standards and protocols . . . a hodgepodge of standards will develop that will both radically increase the costs of coordinating with PSAPs on a nationwide basis, and harm competition for IP-enabled services, because customers will be unable to use multiple vendors in their networks").

233/ *See* BellSouth Comments at 49 (suggesting that compliance with E-911 requirements be required only where "economically and technically reasonably achievable").

234/ *See* SBC Comments at 103-04.

235/ AT&T Comments at 32-33.

standards and obligations for VoIP unless the Commission acts to ensure IP-enabled services providers have access to existing wireline 911 infrastructure from ILECs.[236/] However, the market appears to be addressing that concern, and thus Commission intervention may be unnecessary. For example, as SBC described in its opening comments, SBC already offers 911 service on a nondiscriminatory basis to all VoIP providers. Thus, without any Commission intervention, VoIP providers already may have the ability to obtain 911 service that enables them to offer their customers E-911 service (for registered or "stationary" VoIP applications) comparable to that offered by legacy voice services.

Second, a few commenters suggest that, in the near-term, VoIP providers should be required to inform consumers if their VoIP service does not offer 911 service that is functionally equivalent to that provided by traditional telephone providers.[237/] Many VoIP providers already voluntarily disclose their 911 capabilities and explain explicitly how those capabilities may differ from those of 911 services offered by wireline providers.[238/] However, to the extent the Commission is concerned about potential misalignment between VoIP emergency calling capabilities and some VoIP users' emergency calling expectations (despite widespread voluntary disclosure by VoIP providers), the Commission may want to consider implementing uniform IP-enabled 911 capability disclosure standards, and, in so doing, to preempt myriad state-law requirements that might impose different or additional disclosure requirements.

236/ *See* MCI Comments at 40; Comcast Comments Appendix A at 1; Vonage Comments at 40-41.

237/ *See* FERUP Comments at 15; CenturyTel Comments at 24.

238/ *See, e.g.*, http://www.vonage.com/features.php?features=911 (Vonage's disclosure of 911 capabilities); http://www.voiceglo.com/about_voiceglo/terms (Voiceglo's disclosure of 911 capabilities); http://www.packet8.net/about/e911.asp (8x8's disclosure of 911 capabilities).

Finally, Comcast raises the issue of extending liability limitations that currently exist for wireline and wireless providers of 911 services to IP-enabled providers of 911 services.[239/] SBC concurs that limiting liability of IP-enabled 911 service providers is important to encouraging robust 911 development for IP-enabled services. To reward and encourage continued IP-enabled 911 innovation, the Commission should grant to IP-enabled services providers the same limitations of liability as granted to wireline and wireless voice services providers,[240/] so long as the IP-enabled 911 services meet whatever standards the Commission ultimately adopts for IP-enabled services providers. Creating such parity of liability protection across voice services, regardless of the underlying transmission technology, is important to prevent the inadvertent favoring of some voice transmission technologies over others. Failure to do so would unfairly discriminate against emerging IP-enabled services and distort competition in the market for voice services.

VII. DISABILITY ACCESS IS AN IMPORTANT PUBLIC POLICY THAT THE COMMISSION SHOULD ADDRESS FOR IP-ENABLED SERVICES.

As SBC explained in its opening comments, Commission regulation is necessary to ensure disability access to IP-enabled services.[241/] Most commenters agree.[242/] "People with

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239/ *See* Comcast Comments Appendix A at 4.

240/ *See* 47 U.S.C. § 615a(a).

241/ *See* SBC Comments at 105.

242/ *See* AT&T Comments at 33-37 ("To make sure the entire industry — manufacturers and service providers — are sufficiently focused on developing accessibility measures, the Commission should extend to VoIP providers the general § 255 mandate to implement 'readily achievable' measures."); BellSouth Comments at 23, 25 (noting that VoIP services that interconnect with the PSTN "should be [] subject to appropriate . . . ADA obligations"); Comcast Comments at 8 and Appendix A at 4 ("VoIP service providers can reasonably be expected to . . . enable access by people with disabilities . . . ."); California PUC Comments at 14 ("Customers who are disabled should have reasonable and affordable access to service that is functionally equivalent to voice-grade telephony service offered to non-disabled customers."); Avaya

disabilities should not lose the access that they have acquired over the past several decades simply because our nation is migrating to more advanced technologies that have far better capabilities than traditional telephony."[243/] To ensure that the disabled community is not left out of this new generation of important services, the Commission should focus on the substance of disability access issues now, during the formative stages of this technological revolution when there are the most opportunities for incorporating disability access capabilities.[244/]

A. The Commission Should Not Rely Solely On Market Forces to Provide Access to IP-Enabled Technology for Individuals with Disabilities.

A few commenters suggest that, in light of market forces, disability access regulations are unnecessary and even potentially counterproductive.[245/] SBC does not dispute that, over time, the market may drive IP-enabled services providers to develop applications designed to serve the needs of disabled end users, and manufacturers of IP enabled equipment may do the same. In fact, many commenters outline the tremendous strides that already have been made in this regard.[246/] And IP-based services are inherently more adaptable to individual needs than

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Comments at 14, 16 ("[T]he Commission should — with appropriate recognition of the 'readily achievable' standard and the need for transitions to an IP-enabled environment — extend its existing accessibility rules to VoIP services."); American Foundation for the Blind Comments at 3-4; Self Help for Hard of Hearing People ("SHHH") Comments at 1-2 ("Without FCC regulation of IP-[e]nabled services, people with disabilities will not have access to these emerging technologies."). *But see* VON Coalition Comments at 26 (suggesting that disability access to IP-enabled services "can best be achieved through voluntary efforts encouraged by the Commission but without specific regulatory mandates").

243/ Communication Service for the Deaf Comments at ii.

244/ *See* SBC Comments at 105.

245/ *See* MCI Comments at 42-44 ("There is every reason to believe that the market will produce these [disability access] enhancements without the need of any regulatory interference."); Qwest Comments at 44-46 ("[R]egulatory measures are unnecessary, and could be counterproductive.").

246/ *See, e.g.*, AT&T Comments at 35 (IP Relay and Video Relay, which allow hearing impaired users to access TRS through the Internet rather than through TTY); MCI Comments at

traditional wireline services.[247] But as several commenters caution, "[m]arketplace forces alone . . . may not be enough to ensure that manufacturers and service providers will look for and implement 'readily achievable' measures to make VoIP services more accessible."[248] As the American Foundation for the Blind explains, "people with disabilities simply do not have sufficiently focused power in the market place, that is, the power necessary to negotiate rates, terms, and conditions that affect access to services."[249] Avaya similarly notes that "each individual disability population represents only a small portion of the market, and therefore these populations often cannot generate the necessary consumer demand to induce manufacturers to expend the resources to develop accessible technology. This is exacerbated by the fact that individuals with disabilities on average earn lower incomes, which further reduces their power in the marketplace."[250]

And even though the adaptable nature of IP-enabled services together with market forces may eventually produce the correct result, any delay in making IP-enabled services accessible

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43-44 (SIP technology to enable vision-impaired individual to engage in text conversation using speech-to-text translation program); Level 3 Comments at 38 (advanced touch-screen displays and voice-activated commands offer communications alternatives for individuals unable to use traditional telephony equipment); SBC Comments at 107 (emergency broadcast system for IP phones capable of notifying employees with hearing or vision impairment in accessible format of emergency alerts).

[247] SBC Comments at 105-06; *see also* Avaya Comments at 3 (discussing likelihood that expanded capabilities of IP-enabled services will lead to greater accessibility via IP-enabled services than achieved via traditional telephony services); AT&T Comments at 37 (same).

[248] Avaya Comments at 14; *see also* Communication Service for the Deaf Comments at ii ("[M]arket forces have been insufficient to safeguard the needs of people with disabilities to telecommunications access.").

[249] American Foundation for the Blind Comments at 3-4; *see also* SHHH Comments at 2 ("people with disabilities have never constituted a market that would normally motivate companies to innovate").

[250] Avaya Comments at 16

would be unconscionable. As the Commission has recognized, access to communications is "essential for participation in nearly all aspects of our society," "a critical tool for employment," and capable of "bring[ing] independence" to individuals with disabilities.[251/] A delay in making available IP-enabled services — which rapidly are replacing and improving upon traditional telecommunications services — thus would have an unacceptable adverse impact on all aspects of the lives of individuals with disabilities. As Inclusive Technologies notes, barriers to disability access affect the integration and equality of individuals with disabilities as employees (if their employers adopt IP-enabled services that are inaccessible), as entrepreneurs (if the telecommunications tools required for their business are inaccessible), as residential customers (if inaccessible VoIP offerings are less expensive and more robust than traditional voice services), and as students (if educational institutions utilize inaccessible IP-enabled technology).[252/] Disabled individuals should not be required to sit on the sidelines and wait while the IP revolution unfolds. Access to communications for "*all* the people of the United States" has been a core principle of the Communications Act since 1934;[253/] serving that core principle requires Commission involvement to ensure basic accessibility principles are integrated *today*, not added as an afterthought sometime in the future.

[251/] Report and Order and Further Notice of Inquiry, *Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Rcd 6417, 6420-21 ¶¶ 4-6 (1999) ("*Disability Access Order*").

[252/] Inclusive Technologies Comments at 7.

[253/] 47 U.S.C. § 151 (emphasis added).

B. The Commission Has Ample Authority to and Should Extend Disability Access Requirements to IP-Enabled Services that Interconnect with the PSTN.

The Commission has clear authority under the Act to pursue the goals expressed above.[254/] To begin with, section 255 itself expressly applies to all CPE and telecommunications equipment manufacturers, and thus on its face allows the Commission to require accessibility at least for the equipment that supports IP-enabled services.[255/] With respect to service providers, section 255 grants the Commission express authority to impose disability access requirements on "[a] provider of telecommunications service."[256/] However, the Commission already has determined that it may exercise its ancillary jurisdiction to extend disability access requirements to information services where doing so is "essential to the ability of persons to effectively use telecommunications."[257/] Otherwise, the Commission would be unable to meet its statutory responsibility to ensure that IP-enabled communications are available "to all the people of the United States,"[258/] including those with special needs.

254/ *See* SBC Comments at 107-109; American Foundation for the Blind Comments at 4-5; USTA Comments at 38-39.

255/ 47 U.S.C. § 255(b); *see also* SBC Comments at 108. AT&T erroneously states that section, "by its terms, imposes requirements only on manufacturers . . . of telecommunications services, not [] information service[s]." AT&T Comments at 35. In fact, section 255(b) applies to "[a] manufacturer of telecommunications equipment or customer premises equipment," and the Commission has defined CPE for this purpose to include equipment used for telecommunications, not just telecommunications services. *See Disability Access Order* at 6448 ¶¶ 75-88.

256/ 47 U.S.C. § 255(c).

257/ *Disability Access Order* at 6457 ¶ 97; *see also* SBC Comments at 109; AT&T Comments at 35 ("The Commission has recognized . . . that it has authority to impose the same accessibility requirements on information services under its ancillary Title I jurisdiction.").

258/ 47 U.S.C. § 151.

The Commission accordingly has already rejected the argument, advanced by Qwest here, that section 255 (and section 225) is "inapplicab[le]" to IP-enabled services because the text refers only to "common carrier[s]" and "provider[s] of telecommunications service[s]," respectively.[259/] And in any event, the Commission's ancillary jurisdiction is specifically designed to address those circumstances that may not be entirely addressed by the express language of the statute. As noted above, the courts have recognized that the Commission's ancillary jurisdiction is designed to ensure that the Commission may fulfill its obligations and policies even as technology rapidly develops and changes.[260/] And, contrary to Time Warner Telecom's contention that the Commission's ancillary authority is on "shaky" ground with respect to disabilities access,[261/] the fact that Congress made its goals concerning disabilities access crystal clear emphasizes, rather than undermines, the case for the Commission's ancillary authority.[262/] In exercising its authority with respect to disabilities access in the market for these new communications services, the Commission will be advancing, rather than undermining, the substantive principles embodied in the Communications Act.[263/]

259/ *See* Qwest Comments at 44.

260/ *See* SBC Comments at 53-54; *see also Southwestern Cable*, 391 U.S. at 178; *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video I*").

261/ *See* Time Warner Telecom Comments at 30-31, 35-36 (stating that the "social policies [of sections 225 and 255] would not apply to VoIP if it were classified as a non-telecommunications service on the ground that "[a]ttempts to extend regulations to VoIP that apply under the terms of the statute only to common carriers/telecommunications carriers . . . rest on a shaky legal foundation.").

262/ *See* Report and Order and Further Notice of Proposed Rulemaking, *Digital Broadcast Content Protection*, 18 FCC Rcd 23550, 23563 ¶ 29 (2003) (*"Digital Broadcast Content Order"*) (citing *Southwestern Cable*, 392 U.S. at 178).

263/ *See* SBC Comments at 56 (citing *Midwest Video II*, 440 U.S. at 700-09 (invalidating Commission attempt to impose on cable companies under Title I the type of common carrier regulation that the Act would prohibit if the regulated parties had been broadcasters rather than cable companies)).

Of course, as SBC and most commenters propose, disability access should be required only for those IP-enabled services that interconnect with the PSTN.[264/] The Commission's ancillary jurisdiction is most clear with respect to such services, because they will, over time, replace and, in the interim and foreseeable future, interact transparently with legacy PSTN services. If the Commission did not have ancillary jurisdiction here, it would be unable to serve Congress's overarching goal of ensuring that the communications network is accessible to all. In addition, limitations on accessibility or interoperability for new IP-enabled services could ultimately reduce the value of the access people with disabilities obtain with respect to legacy services. In such circumstances, courts have upheld the Commission's exercise of ancillary jurisdiction.[265/]

There is no basis for some commenters' suggestion that accessibility requirements should be limited to IP-enabled *voice* services.[266/] Nothing in the text of sections 255 and 251(a)(2) limits disability access to voice telecommunications services, and therefore there is no reason to limit accessibility to only the voice category of the new services that increasingly will displace existing telecommunications services. In addition, some non-voice IP-enabled services may help facilitate the ability of individuals with disabilities to communicate with individuals using voice

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264/ PSTN interconnection is a technology-neutral criterion that gauges whether the service can be used to communicate on the nation's primary communications infrastructure; it does not gauge, as one commenter suggests, "the type of carriage being used to convey the communication." Communication Service for the Deaf Comments at 6.

265/ *See Midwest Video II*, 440 U.S. at 706-07 (ancillary jurisdiction appropriate to "prevent interference with the Commission's work"); *Disability Access Order* at 6455 ¶ 93.

266/ *See* AT&T Comments at 33-34 ("[T]he Commission should extend its § 255 disability rules to IP-enabled voice services."); MCI Comments at 42-43 (discussing the Commission's ancillary jurisdiction to impose disability access requirements on "a subset of IP-based voice applications . . ."); *see also* Comcast Comments at 8 ("VoIP providers can reasonably be expected to enable access by people with disabilities."); Time Warner Inc. Comments at 14 ("VoIP services that meet [certain] criteria . . . [should be] subject to disability requirements.").

communications, and it therefore would make no sense to exclude these services arbitrarily from the accessibility requirements. For example, text-to-speech technology could facilitate communication between a speech-impaired IP-enabled services end user and an end user using a PSTN-based voice service. The Commission should formulate rules that encourage, rather than discourage, the development and deployment of such technologies. And as a general practical matter, it should be no more difficult for IP-enabled services providers to make their non-voice services accessible to individuals with disabilities than to make their voice services accessible.

The Commission also has authority to extend section 225's TRS contribution requirements to IP-enabled services providers.[267/] While Qwest suggests that the Commission's authority under section 225 is limited to common carriers,[268/] that is not the case: section 225 authorizes the Commission to collect TRS contributions from "subscribers for every interstate service."[269/] And in any event, the Commission at a minimum possesses ancillary jurisdiction to require IP-enabled services providers to contribute to the TRS fund because the Commission otherwise would be unable to discharge its statutory obligations under sections 225 and 251 of the Act.[270/] The Commission should exercise that authority to require TRS contributions, because doing so will ensure critical TRS funding even while voice traffic migrates from

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267/ *See* SBC Comments at 111; Comcast Comments Appendix A at 4; USTA Comments at 39.

268/ *See* Qwest Comments at 44 (arguing that section 225 "applies to common carriers providing voice services" and is "inapplicab[le]" to IP-enabled services).

269/ 47 U.S.C. § 225(d)(3)(B).

270/ *Id.* § 225 (obligating the Commission to ensure that interstate and intrastate TRS is available to hearing- and speech-impaired individuals); *id.* § 151 (obligating the Commission to ensure, nationwide, generally available communications "to all the people of the United States").

wireline services to IP-enabled services.[271/] To ensure access to new and innovative IP-enabled services, in addition to continued access via existing TRS technology, the Commission also should reaffirm its decision to allow reimbursement of IP-enabled TRS from the interstate TRS fund.[272/]

VIII. THE COMMISSION HAS THE AUTHORITY TO REQUIRE UNIVERSAL SERVICE CONTRIBUTIONS FROM, AND TO PROVIDE UNIVERSAL SERVICE SUPPORT TO, IP-ENABLED SERVICES PROVIDERS.

As SBC and nearly all other commenters who have addressed the issue advocate, the Commission should take this opportunity to remedy the current inequity in its universal service support policies and to preserve the universal service funding base by requiring contributions from IP-enabled services providers. Further, as a number of commenters recognize, it may be appropriate for the Commission to consider supporting IP-enabled services at some point in the future, although such support is unnecessary today.

A. The Commission Should Require Providers of IP-Enabled Services to Contribute to Universal Service.

The communications market has witnessed an increasing shift of traffic and revenues from traditional PSTN-based traffic to information services offered over broadband networks,

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271/ *See* SBC Comments at 111; National Consumer League Comments at 6 ("Without [VoIP providers'] participation in the [TRS] fund, there will be fewer resources to make access via relay available to people who rely on it to communicate by telephone."); Communication Service for the Deaf Comments at 10 ("As IP-enabled services increasingly take the place of traditional telephone services, support for relay services will erode unless the companies that provide these Internet services are required to contribute proportionally to the TRS Fund."); Telecommunications for the Deaf Comments at 8 ("[T]he migration of telecommunications traffic to the Internet might undermine the current compensation program among telecommunications providers.").

272/ SBC Comments at 112 (citing Declaratory Ruling and Second Further Notice of Proposed Rulemaking, *Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 17 FCC Rcd 7779, 7792 ¶ 41 (2002)).

but the Commission's universal service support policies continue to impose the overwhelming bulk of universal service support obligations on legacy common carriers. This is so even though many of the new providers of IP-enabled services interconnect with, and send traffic to, the PSTN. As SBC recommended in its opening comments, and as many commenters agree, the Commission should eliminate this basic unfairness and require IP-enabled services providers who interconnect with the PSTN to contribute to the federal universal service fund, a result that follows naturally from the Commission's recent pronouncements that those who use and benefit from the PSTN should contribute to its support.[273/]

This view is supported by the overwhelming majority of commenters, including state regulators and competitors from all corners of the industry, who recognize that requiring IP-enabled services providers that interconnect with the PSTN to contribute to universal service support would be more equitable than the current system and would best preserve universal service.[274/] As AT&T notes, for example, a contribution system that includes IP-enabled services providers would be "much more equitable than the current system" and would "halt the

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[273/] *AT&T Access Charge Order* ¶ 15.

[274/] *See, e.g.*, Verizon Comments at 55 ("The Commission should ensure that all providers of VoIP contribute to universal service . . . ."); Comcast Comments at 8 and Appendix A, at 3 (suggesting that VoIP providers who use NANP numbers should contribute to universal service); Time Warner Inc. Comments at 15 (recommending that VoIP providers who use NANP numbers and interconnect with the PSTN should be required to contribute to universal service); New York AG Comments at 9 (recommending that "the Commission require all VoIP service providers to contribute to the USF in a manner similar to that applicable to non-VoIP providers"); Texas AG Comments at 4 ("[T]he Commission should require VoIP service providers to contribute to universal service."); Interstate Telecom Consulting, Inc. ("ITCI") Comments at 8 ("In light of the facilities and benefits they enjoy as a result of the Universal Service Fund, VoIP providers should be required to contribute to it."); National Grange Comments at 2 ("IP-enabled voice service providers (VOIP) must contribute to the universal service fund to ensure affordable access to telecommunications services for all Americans."); *see also* Sprint Comments at 22; Valor Telecommunications Comments at 12; Virgin Mobile USA Comments at 7-9; Communications Workers of America ("CWA") Comments at 17-18.

erosion of the contribution base that is a result of the migration to nontraditional services."[275] Similarly, the Office of the Attorney General of Texas "urges the Commission to ensure that VoIP services that send traffic to the PSTN contribute to universal service," noting that as "more customers migrate to VoIP service, the cost of universal service and maintenance of the PSTN will fall on consumers that remain on the PSTN, unless some action is taken."[276] Several other commenters note that broadening the universal service contribution base would not only better preserve universal service fund support but would eliminate the increasing imbalance caused by the existing narrow contribution requirements.[277]

A sparse handful of commenters suggest that there is no need to require contributions from IP-enabled services providers, because the underlying telecommunications carriers who provide the transmission used by IP-enabled services providers already contribute based on the revenues earned in connection with those transmission services, while non-facilities-based VoIP providers contribute indirectly through the revenues they pay to these underlying carriers.[278]

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[275] AT&T Comments at 38-39.

[276] Texas AG Comments at 3.

[277] *See, e.g.*, Virginia SCC Comments at 18 (failure to require IP-telephony providers to contribute would be "unfair to other carriers [and] put . . . the system of universal service at even greater risk than it is already experiencing in today's environment"); Verizon Comments at 55 ("[T]he obligations to contribute to the [universal service fund] should be applied in a competitively neutral manner to all providers of voice services — including both traditional wireline and VoIP service.").

[278] *See, e.g.*, Skype Comments at 5; Vonage Comments at 49-50. CompTel suggests that requiring IP-enabled services providers to contribute directly to universal service could result in double recovery. CompTel/ASCENT Comments at 18 ("The Commission needs also to ensure that modifications to the universal service fund contribution mechanism do[] not unduly burden providers of IP-enabled applications as both direct and indirect contributors to the universal service fund, due to their incorporation of underlying communications services."); *see also* Vonage Comments at 51 (suggesting that, because IP-enabled services providers already contribute indirectly to universal service, collecting directly from such providers would yield little if any benefit in terms of universal service support relief).

Under the current system, underlying telecommunications carriers do pay universal service support based on the revenues they earn from providing wholesale transmission service to the IP-enabled services provider, these wholesale revenues are typically low relative to the retail revenues the IP-enabled services provider in turn earns when it bundles that transmission with its own services. The minimal "indirect" contribution IP-enabled services providers make is far less than the approximately 10% contribution other providers pay with respect to their retail revenues. The New York Attorney General and other commenters correctly observe that sparing IP-enabled services providers from this full contribution burden creates an artificial price differential between VoIP and PSTN services and threatens to "undermin[e] USF and the PSTN itself."[279/]

Several commenters recommend that the Commission change the existing contribution methodology and adopt a "numbers" or "connection-based" contribution methodology.[280/] However, the Commission has properly decided to "leave questions of whether to reform the current methodology to the separate *Universal Service Contribution Methodology* proceeding."[281/] The choice of a contribution methodology is logically separate from the question of which carriers should bear a contribution obligation. The Commission should focus first on determining who must contribute to universal service in this proceeding before establishing a contribution methodology. The Commission's decision on an appropriate contribution methodology could then be informed by decisions to require contributions from IP-

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279/ Attorney General of the State of New York ("New York AG") Comments at 9-10; *see also* Virginia SCC Comments at 18.

280/ *See, e.g.*, MCI Comments at 49-50; AT&T Comments at 37-40; Level 3 Comments at 22-24; Ad Hoc Telecommunications Users Committee Comments at 13-18.

281/ *IP-Enabled Services NPRM* ¶ 63.

enabled services providers that interconnect with the PSTN and to require contributions from cable modem providers.

B. The Commission Has Ample Authority to Require Providers of IP-Enabled Services to Contribute to Universal Service.

The Commission has ample authority under the Act to assess universal service contributions from IP-enabled services providers. The Commission's permissive authority authorizes it to assess contributions from "any . . . provider of interstate *telecommunications* . . . if the public interest so requires."[282/] As SBC and many other commenters explain, the Commission's express permissive authority under section 254(d) extends to any provider that offers IP-enabled service to its subscribers using some form of telecommunications, *i.e.*, transmission, that it owns or leases.[283/] Indeed, the Commission has already tentatively determined that an information service provider that "owns or leases the underlying transmission facilities on which its packets are transmitted . . . is providing telecommunications" and therefore falls within the scope of the Commission's permissive contribution authority.[284/]

Some commenters nevertheless argue that the Commission does not have the authority to require support from information service providers and thus cannot recover universal service contributions from providers of IP-enabled services. However, the few commenters who contend the Commission has no authority[285/] simply fall back on the argument that no

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282/ 47 U.S.C. § 254(d).

283/ SBC Comments at 113-14; Verizon Comments at 61; Vonage Comments at 51; NCTA Comments at 25.

284/ Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3033 ¶ 25 (2002) ("*Wireline Broadband NPRM*").

285/ *See, e.g.*, ITAA Comments at 15-16; Pac-West Comments at 17-19; Sprint Comments at 30-33.

information service providers provide telecommunications. For example, the Information Technology Association of America ("ITAA") argues that the Commission lacks the authority to require information service providers to contribute to the universal service fund because "[i]nformation service providers do not 'provide' telecommunications services — they *use* telecommunications in order to provide information services."[286/] These commenters fail to recognize that the Commission has already suggested that an information service provider could properly be considered to be "providing telecommunications to itself" and that "it may be advisable to exercise our discretion under the statute to require such providers that use their own transmission facilities to contribute to universal service."[287/]

Further, even if the Commission's permissive authority were insufficient (as some commenters suggest), the Commission's *ancillary authority* under Title I provides the Commission with distinct power to require universal service contributions of IP-enabled services providers.[288/] Title I establishes a mandate for the Commission to create a universal service program by authorizing the Commission to "regulat[e] interstate . . . commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[289/] The Commission's ancillary Title I universal service authority, found in sections 151 and 154(i), is an independent basis for the

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[286/] ITAA Comments at 15-16; Sprint Comments at 30-31 (citing S. Rep. No. 104-23, at 28 (1995)).

[287/] *See Report to Congress* at 11534-35 ¶ 69, 11569-70 ¶ 139.

[288/] *See, e.g.*, Time Warner Inc. Comments at 15, 23 (advocating that VoIP providers be assessed universal service contributions and noting that the Commission can use its Title I ancillary jurisdiction to achieve the regulatory framework Time Warner advocates even if VoIP services are classified as information services).

[289/] 47 U.S.C. § 151.

Commission's universal service program that predates section 254 of the Act. Indeed, the Commission relied on this authority to adopt a universal service program — and the courts affirmed the exercise of that authority — long before Congress enacted section 254.[290/] Further, because the migration of consumers from legacy common carriers to IP-enabled services providers has the potential to dramatically affect the funding base for universal service, the Commission would be well within its ancillary authority to support the PSTN by imposing contribution obligations on the providers of information services who benefit from their ability to interconnect with, and impose burdens upon, the PSTN.[291/] As noted above, the courts have long recognized the Commission's authority to prevent "interference" with its ability to accomplish the Act's purposes.[292/] In sum, between the Commission's express permissive authority and ancillary jurisdiction, there is no question that the Commission has the ability to require all IP-enabled services providers to support universal service.

The Commission also has ample authority, when revising its universal service support policies to account for IP-enabled services, to correct the serious competitive inequity that exists in the current framework between DSL and cable modem services providers.[293/] As SBC and several other commenters note, the Commission should do so promptly.[294/] Today, the

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290/ *See generally* Decision and Order, *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, 96 F.C.C.2d 781, 791-802 ¶¶ 21-48 (1984), *aff'd*, *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (declaring that "universal service is an important FCC objective" and establishment of a Universal Service Fund is "within the Commission's statutory authority" under section 151).

291/ *See* Time Warner Inc. Comments at 23; Texas AG Comments at 5.

292/ *See Midwest Video II*, 440 U.S. at 706-07.

293/ *See* SBC Comments at 118-19.

294/ *See, e.g.*, Illinois Commerce Commission Comments at 15 ("[C]ompetitive equity considerations and the benefits of widely and properly diffusing responsibility for supporting universal service argue, at least for some time period, for both wireline and non-wireline

Commission assesses universal service contributions from providers of DSL service, because DSL service is classified as a telecommunications service and is therefore subject to a mandatory contribution requirement.[295/] On the other hand, because cable modem service is classified as an information service, providers of cable modem service are not required to contribute to universal service.[296/] To remedy this inequity, the Commission should use its permissive authority to assess contributions on cable modem service providers, which provide telecommunications to themselves as an input into their cable modem service offerings.[297/] As numerous commenters from both industry and government note, principles of competitive neutrality mandate that the Commission promote universal service in an equitable manner and avoid artificially skewing the market for broadband Internet access service by excusing cable modem service from contribution obligations.[298/] The current disparity severely distorts the competitive playing field for broadband services and creates disincentives to investment for wireline broadband Internet access.[299/]

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broadband platform providers to participate in the support of universal service."); Covad Comments at 29 ("[P]roviders of cable modem broadband Internet access services continue providing service without paying universal service contributions based on their revenues from such service. . . . The Commission should end this regulatory disparity, and act now to ensure that all providers of broadband transmission services . . . with an integrated facilities-based broadband transmission component, contribute equitably into the federal universal service fund."); Organization for the Promotion and Advancements of Small Telecommunications Companies ("OPASTCO") Comments at 9 ("[T]he FCC should require all facilities-based broadband Internet access providers to contribute to the Universal Service Fund (USF).").

295/ *See Wireline Broadband NPRM* at 3051-54 ¶¶ 72-79.

296/ *See id.*

297/ *See Report to Congress* at 11534-35 ¶ 69, 11569-70 ¶ 139.

298/ *See, e.g.*, Illinois Commerce Commission Comments at 15; Covad Comments at 29; OPASTCO Comments at 9-10.

299/ *See* SBC Comments at 119.

C. The Commission Has the Authority to Provide Universal Service Support to IP-Enabled Services, If and When Appropriate in the Future, But It Should Not Do So Now.

In addition to requiring universal service contributions from providers of IP-enabled services, the Commission has authority to provide universal service support for those services — if and when the need to do so arises in the future — though it should not exercise that authority now. As noted in SBC's opening comments, the Commission's longstanding Title I authority to make affordable communications available nationwide fully empowers it to support new technologies at a later date should that become necessary.[300/] The Commission retains the general Title I authority "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, . . . wire and radio communication service with adequate facilities at reasonable charges."[301/] While section 254 does not explicitly authorize support for information services, it clearly does not prohibit the Commission from providing such support to advance the general mandate of section 151, which supplied the Commission with ample authority to maintain a universal service program for more than a decade before Congress enacted section 254 in the 1996 Act.[302/]

Other commenters agree that universal service funding may be appropriate for IP-enabled services. FERUP, for example, advocates that "if VoIP providers ultimately are required to share in the burden" of contributing to universal service, "they ought to be considered for USF

300/ *Id.* at 122.

301/ 47 U.S.C. § 151.

302/ In addition, if the Commission found it necessary, the Commission has the authority under section 10(a) to forbear from the provisions in section 254(c)(1) and 254(e) that limit universal service support to telecommunications services.

distributions."[303/] Time Warner similarly notes that "VoIP providers should be entitled to the same rights as circuit-switched CLECs . . . to receive universal service subsidies."[304/]

While the Commission has *authority* to provide universal service support for IP-enabled services under the appropriate circumstances in the future, SBC emphasizes that the Commission should *not* do so now. Unlike the mature market for POTS service, the market for IP-enabled services is still in its infancy, and it would be premature for the Commission even to begin considering which IP-enabled services to support or whether IP-enabled services are even in *need* of support in the first place. Rather, the Commission should simply affirm that it has authority to support IP-enabled services if that need arises in the future.

IX. INDUSTRY-SPECIFIC CONSUMER PROTECTION REGULATION OF IP-ENABLED SERVICES PROVIDERS IS UNNECESSARY BECAUSE STATE AND FEDERAL LAWS OF GENERAL APPLICABILITY PROVIDE CONSUMERS AMPLE PROTECTION.

As SBC explained in its opening comments, the Commission need not and should not extend legacy telecommunications carrier consumer protection regulations to the IP-enabled services market because federal and state laws of general applicability already restrict practices by IP-enabled services providers that could harm consumers. In the words of FERUP,

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303/ FERUP Comments at 16.

304/ Time Warner Inc. Comments at 2; *see also* Comcast Comments Appendix A at 2 (VoIP providers who interconnect with the PSTN should have "[t]he right to draw from universal service mechanisms for high-cost/rural support"); Time Warner Telecom Comments at 30 ("Eliminating VoIP from the class of service subject to subsidy would therefore gradually reduce the number of eligible recipients of universal service funding or relegate those recipients to less sophisticated TDM voice offerings. It is hard to see how this outcome comports with the intent of Congress in enacting Section 254.").

"[e]xisting federal and state generic consumer protection laws are sufficient to address the vast majority of consumer protection issues."[305]

Furthermore, as many commenters, including SBC, explain, regulations should in most cases prove unnecessary, because the IP-enabled services market is highly competitive and marked by low barriers to entry. Market forces therefore should and do effectively constrain the behavior of providers in the market. As the Voice on the Net ("VON") Coalition notes, "In a competitive telecommunications marketplace, VoIP providers must provide . . . basic consumer protections in order to attract or retain customers. If a VoIP provider does not offer such protections, it will lose customers to competitors who do."[306] Indeed, as SBC and others note, market forces already have encouraged providers to work voluntarily to protect consumers' privacy interests.[307] Legacy regulations, which were "developed to protect consumers from the monopoly utility in a single-provider environment, are unnecessary and inappropriate for

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[305] FERUP Comments at 17. Most other commenters agree. *See, e.g.*, AT&T Comments at 40-41; Comcast Comments at 9-10; 8x8 Comments at 29-31; Verizon Comments at 30 n.78; Cablevision Systems Comments at 13-14; Net2Phone Comments at 20; VON Coalition Comments at 28-29.

[306] VON Coalition Comments at 29; *see also* Net2Phone Comments at 20-21 ("Utility-type regulation simply is not justified when market competition and existing consumer protection laws effectively shield consumers from excessive prices and unfair practices. . . . Since providers actively compete for consumers, the market offers sufficient incentives for VoIP providers to offer high quality services and products that meet customer demand."); Nuvio Comments at 8 (suggesting it is "premature" to impose regulatory requirements developed for the traditional telecommunications context on the nascent IP-enabled services industry, "particularly when market forces are already bringing essential capabilities, as well as expanded functionality, to IP-enabled services").

[307] *See, e.g.*, AT&T Comments at 41-42 (discussing provisions of AT&T's voluntarily adopted privacy policy which protect consumer information from unauthorized disclosure or sharing); SBC Comments at 125 (discussing industry-wide groups such as the TRUSTe Privacy Partnership designed to develop standards for consumer privacy protection and ensure provider compliance).

competitive VoIP services."[308] As Comcast explains, "fully functioning markets do a better job of maximizing consumer welfare than regulators can ever hope to do."[309]

Some commenters nonetheless argue that the Commission *should* extend specific legacy telephone network regulations to IP-enabled services providers.[310] But none of these commenters provide compelling explanations as to why there is any need to do so, nor do they explain how their suggestions can be squared with the unregulatory framework that Congress and the Commission have advocated for IP-enabled services.[311] For example, the Illinois Commerce Commission and Time Warner Telecom suggest that concerns over "slamming" warrant extending the Commission's anti-slamming regulations to cover IP-enabled services;[312] the Illinois Commerce Commission also argues that the Commission's Truth-in-Billing ("TIB") rules should apply to IP-enabled services providers;[313] the U.S. Department of Justice and the

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[308] NCTA Comments at 19-20; *see also* Texas AG Comments at 14 ("[L]aws and regulations which arose out of legacy telephone service should not be presumed to apply to VoIP services.").

[309] Comcast Comments at 10 (quoting Commissioner Kathleen Q. Abernathy); *see also* Net2Phone Comments at 20-21 ("In order to maintain the incentive to offer novel services, however, IP-enabled technologies must be left to flourish in an environment that embraces innovation rather than stifles it through the imposition of outmoded requirements. At this stage in the market, there is no justification for the imposition of traditional telephony regulation on IP services."); Level 3 Comments at 39 (stating that since the market is addressing consumers' concerns, the Commission "should not contort statutory definitions or expansively interpret its ancillary jurisdiction to address them on its own").

[310] *See, e.g.*, CenturyTel Comments at 22; National Grange Comments at 3; Alliance for Public Technology Comments at 6.

[311] *See* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."); *IP-Enabled Services NPRM* ¶ 5 (expressing the Commission's intent to "rely[] wherever possible on competition and apply[] discrete regulatory requirements only where such requirements are necessary to fulfill important policy objectives").

[312] *See* Illinois Commerce Commission Comments at 16-17; Time Warner Telecom Comments at 32.

New York Attorney General's Office advocate extending the Commission's CPNI regulations to IP-enabled services providers;[314/] and, other commenters, including CenturyTel, advocate extending a broad range of legacy telephone network regulations to IP-enabled services providers.[315/] But each of these proposals is essentially a reflexive regulatory reaction that does not engage in any serious analysis of the IP market or federal communications policy.

No commenter has articulated why or how slamming is a significant concern in the context of IP-enabled services. By contrast, AT&T suggests that there are technical barriers to slamming an IP-enabled services customer, arguing that "[a] would-be slammer would literally have to install a telephone adapter in an end-user's residence," and that "[s]lamming is no more a practical threat in the VoIP environment than it is in the ISP industry."[316/] But even leaving aside the technical feasibility of slamming, no commenter presents evidence that slamming has in fact occurred, much less at a frequency that would warrant regulatory intervention.

Indeed, anti-slamming rules were developed for the legacy telephone services market where slamming is a real and present concern. Neither the Illinois Commerce Commission nor Time Warner Telecom explains why it makes sense to impose regulations in the IP-enabled services market *before* there is any evidence that a problem exists. Nor do they explain why it would not make more sense to address any concerns about the potential for slamming through generally applicable consumer protection laws prohibiting fraudulent practices and appropriate

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313/ *See* Illinois Commerce Commission Comments at 16-17.

314/ *See* U.S. Department of Justice Comments at 17; New York AG Comments at 10-11.

315/ *See* CenturyTel Comments at 22; National Grange Comments at 3; Alliance for Public Technology Comments at 6.

316/ *See* AT&T Comments at 41.

and stringent number portability rules. That approach is surely more consistent with Congress's unregulatory approach to Internet-based technologies, codified in section 230 of the Act.[317/]

Proposals to impose Truth-in-Billing rules are similarly unnecessary and overly regulatory. IP-enabled services providers are already subject to a host of federal and state requirements that mandate truthful billing and ban deceptive practices.[318/] As a number of state commenters note, "[t]he states have a long history of regulating against unfair business practices and protecting residents' rights, even *vis-à-vis* telecommunications services providers."[319/]

For similar reasons, no special CPNI rules are necessary. Individual providers and industry-wide partnerships in the IP-enabled services market have already crafted privacy policies to protect consumer proprietary information,[320/] and market forces will continue to pressure IP-enabled services to improve and promote consumer privacy. As Level 3 notes in its comments,[321/] the Federal Trade Commission ensures that companies stand by the privacy policies and promises they adopt. There of course is no guarantee the market will always operate

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317/ *See* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

318/ *See, e.g.*, Texas AG Comments at 16-17; New York AG Comments at 11-12; AT&T Comments at 41.

319/ Texas AG Comments at 15-17 (discussing examples of state consumers protection laws such as the Texas Deceptive Trade Practices Act); *see also* New York AG Comments at 13 (noting that "[s]tate Attorneys General and the Federal Trade Commission serve essential functions to enforce federal and state laws forbidding illegal and deceptive business practices or advertising"). In addition, as SBC noted in its opening comments, the FCC adopted its TIB rules because common carrier billing practices were specifically excluded from generally applicable consumer protection statutes. However, if IP-enabled services are correctly classified as information services, providers in this market would not be common carriers and would therefore be subject to generally applicable consumer protection statutes. *See* SBC Comments at 125.

320/ *See, e.g.*, AT&T Comments at 41; SBC Comments at 125.

321/ Level 3 Comments at 39.

as it should, but *existing* federal and state consumer protection laws are designed to police such market failures and abuses. And, of course, as the Texas Attorney General notes, if, over time, the Commission "determine[s] on the basis of actual experience in the marketplace," that there are areas that "require specific consumer protection regulations to protect consumer interests,"[322/] the Commission can address such issues at the proper time. As Verizon aptly states, "[r]ather than saddling emerging technologies and services with complicated rules that may prove entirely unnecessary, the Commission [should] revisit the issue only where there is a demonstrated need for specific protections."[323/]

There are a handful of issues today, however, that may merit some minimal regulation. As SBC suggested, the Commission may wish to consider requiring IP-enabled services providers to give customers some limited notice of discontinuance of service, because market forces are least effective when a provider is exiting the marketplace, and because discontinuance of service could have a substantial effect on customers' seamless access to communications services.[324/] Section 151 of the Act would support the Commission's authority to address this concern.[325/] As most commenters note, however, the Commission should not and need not extend the full range of entry and exit regulations to the IP-enabled services industry.[326/]

322/ Texas AG Comments at 17.

323/ Verizon Comments at 30 n.78.

324/ In addition, Time Warner Telecom suggests that concerns about "ensuring that telephone and other telecommunications service customers are granted an adequate transition period to choose another service provider before their existing service arrangements are discontinued" warrant extending at least some service discontinuance protections to IP-enabled services customers. Time Warner Telecom Comments at 32.

325/ As SBC has noted, the Commission's section 151 mandate to ensure "adequate facilities" for communications, especially for "promoting safety of life and property," provides a firm basis for exercising Title I authority to require providers to give customers limited notice before discontinuing a customer's service. *See* SBC Comments at 126-27 (citing 47 U.S.C. § 151). The

As SBC noted in its opening comments, SBC is committed to working with consumers and other stakeholders to prevent unfair business practices and protect consumer interests. As the majority of commenters note, state and federal laws of general applicability provide consumers in the emerging market for IP-enabled services with ample protection. The Commission can best serve the interests of both consumers and IP-enabled services providers by relying on those general laws and allowing this well-functioning market to continue to grow unimpeded by superfluous legacy regulations.

exercise of such authority would clearly be "reasonably ancillary" to fulfilling the Commission's responsibility under section 214(a) of the Act for overseeing the discontinuance of service by common carriers.

326/ *See, e.g.*, AT&T Comments at 40-41; Comcast Comments at 9-10; Verizon Comments at 28, 30 n.78.

CONCLUSION

The Commission should establish an unregulatory framework for IP-enabled services by adopting the approach that SBC outlined in its previously filed petitions and opening comments, and which the majority of commenters support. Doing so will ensure that these services continue to thrive in a "vibrant and competitive free market" as contemplated by the Act, which will bring immeasurable benefits to American consumers and businesses.

Respectfully submitted,

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July 14, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have caused the foregoing Reply Comments of SBC Communications Inc. to be filed with the FCC, via its Electronic Comment Filing System, in WC Docket 04-36 this 14th day of July, 2004.

/s/ John Meehan